THE HAMLYN LECTURES

EIGHTEENTH SERIES

OTHER PEOPLE'S LAW

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OTHER PEOPLE'S LAW

The Hon LORD KILBRANDON, LL D

One of the Senators of Her Majesty s College of Justice in Scotland Chairman Scottish Law Commission

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CONTENTS

PART I

THE CIVIL LAW

PART II

THE CRIMINAL LAW

HAMLYN LECTURERS

1949 The Right Hon Sir Alfred Denning
1950 Richard O Sullivan Q C
1951 F H Lawson D C L
1952 A L Goodhart K B E Q C F B A
1953 Sir Carleton Kemp Allen Q C F B.A
1954 C J Hamson M A LL M
1955 Glanville Williams LL D
1956 The Hon Sir Patrick Devlin
1957 The Right Hon Lord MacDermott
1958 Sir David Hughes Parry Q C M A LL D D C L
1959 C H S Fifoot M.A F B A
1960 M C Setalvad Padma Vibhufhan
1961 T B Smith Q C D C L LL.D F B A
1962 R E Megarry Q C M A LL D
1963 The Baroness Wootton of Abinger
M A (HON) LL D
1964 Erwin N Griswold M.A LL D S.J.D
1965 The Right Hon Lord Tangley K B E LL D
1966 The Hon Lord Kilbrandon, LL D

To R C S

THE HAMLYN TRUST

THE Hamlyn Trust came into existence under the will of the late Miss Emma Warburton Hamlyn of Torquay who died in 1941 at the age of eighty She came of an old and well known Devon family Her father William Bussell Hamlyn practised in Torquay as a solicitor for many years She was a woman of dominant character intelligent and cultured well versed in literature music and art and a lover of her country She inherited a taste for law and studied the subject She also travelled frequently on the Continent and about the Mediterranean and gathered impressions of comparative jurisprudence and ethnology

Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague The matter was taken to the Chancery Division of the High Court which on November 29 1948 approved a scheme for the administration of the Trust Paragraph 3 of the Scheme is as follows

> The object of this charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Juris prudence and the Ethnology of the chief European countries including the United Kingdom and the circumstances of the growth of such jurisprudence to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges

may recognise the responsibilities and obligations attaching to them

From the first the Trustees decided to organise courses of lectures of outstanding interest and quality by persons of eminence under the auspices of co operating Universities or other bodies with a view to the lectures being made available in book form to a wide public

The Eighteenth Series of Hamlyn Lectures was delivered in November 1966 by the Hon Lord Kilbrandon in the Library of the Royal Faculty of Procurators in Glasgow and in the University of Glasgow

J N D Anderson
Chairman of the Trustees

November 1966

INTRODUCTION

THE title I have given to these lectures is Other People s Law I feel that a word or two is due in explanation and perhaps I owe some apologies as well What I propose to do in these lectures is to take some aspects of the law as we know it in Britain examine them critically and ask you to look at the law of some other countries by way of comparison with ours These aspects are grouped under two main heads one dealing with civil rights and obligations the other with the enforcement of the criminal law There are three things I want to say before I begin

First I have been guilty already of suggesting that there is something called British law whereas of course in Great Britain there flourish two independent systems of law the Scots and the English My education and qualifications extend only to the former and if I do any violence to the latter I must offer this extenuating circumstance I am not purporting to produce a textbook of either system I am only trying to draw some conclusions upon topics which as a citizen I have come to regard as of burning and urgent importance It is to the consequences which flow from these conclusions that I hope an examination of foreign systems may be relevant

Secondly I am Chairman of the Scottish Law Commission I was accorded the great honour of delivering these lectures I had decided on the scope of them and they were in rough outline long before the Law Commissions Act 1965 was ever introduced to Parliament So it must be clearly

understood that these lectures in no way express the views of the Commissioners who may for all I know violently disagree with them there is no reason whatever to suppose that changes along lines I may suggest will be recommended by the Commission, or on the other hand that they will not

Thirdly and it is perhaps here that some explanation is most loudly called for it will be objected that these lectures seem to hold themselves out as a work on comparative law a department for the specialist scholar alone and that I have no qualifications at all which entitle me to enter that field At first sight there is no answer to this charge, because I am nothing but a working practitioner but I think I can find exculpation in the terms of Miss Hamlyn s charity themselves The principal object is reproduced in the first page of this book From it you can see that what is called for is not a lawyers or students textbook but something which so far as may be is a popular work for the appreciation of everyone It has not been altogether possible to avoid technical terms but I hope they mostly explain themselves The footnotes are very slight because the lawyer is unlikely to be looking here for authority I think if I were to generalise about the kind of audience other than lawyers I am aiming at I would say that it includes all professional men and women and also those very many people who enjoy reading the daily law reports in *The Times* and *The Guardian* The last thing that I would claim to have produced is a work of scholarship in the science of jurisprudence And if some of my conclusions seem to favour the systems from which I draw comparisons I hope I may not be deemed to be in breach of Miss Hamlyn s Trust

The topics I deal with have not been selected at random They are not the most popular' of subjects which might have been put forward for the entertainment and enlighten ment of a non legal public but they do have this significance they deal with matters of great intrinsic importance It will always be found that matters which are of great intrinsic importance to the lawyers and are debated among them at inordinate length and in an esoteric vocabulary do strangely enough turn out when you look at them non technically to touch the man in the street very closely indeed And the topics are not less but more interesting to the ordinary citizen in the sense that they vitally affect his welfare because they deal with what might be called professional matters You would be surprised how often the just society the good life human happiness call it what you will is pushed out of our reach not by the malevolence of some people usually referred to as they' who are consciously depriving us of it or by the inertia of those to whom we entrust the duty of provision but by some technical inadequacy The meaning of the lines apparently cynical if read out of context

How small of all that human hearts endure
That part which laws or kings can cause or cure

could be turned to this that quite often what we really want would be readily attainable without calling for a revolution ary change say from Monarchy to Marxism or from a feudal to a mercantile system it is not so much a constitutional or moral upheaval that we are awaiting as rather a little quiet reconsideration of our administrative machinery This is true of Parliament of our legal procedures and of our ancient prejudices in Church and State The ship is well designed

fundamentally sound and is for most of the time on a correct course, what is wanted is an overhaul and modernisation of the navigational instruments so that she is more easily kept on that course And some of the officers are getting a bit elderly—this will always be true

I will give one example which is quite unrelated to the actual subject matter which follows but has always fascinated me I should dearly like some day to see a study of it made There must be something very peculiar and utterly immature about British local administration and finance, that is the machine we have designed or rather tolerate for the good order and government of our cities I make this assertion not as a consequence of any study adequate or inadequate that I as a lawyer have made of the constitution of local government I make it as I am entitled to do as an ordinary citizen after the most superficial examination of the fruits of the tree and especially after looking over other people s garden walls In the City of London twenty years after the catastrophe you could still see areas of vacant ground some of the most valuable commercial property in the world complacently described as bombed sites as if they had been bombed the year before In Edinburgh there have stood for many years one near each end of Princes Street the blackened shells of two places of public entertainment while sites for housing and even car parking are an urgent need These phenomena are consequences of gross administrative incompetence—not incompetence of the administrators themselves but of the systems they are impotently trying to operate And it is probable that some small reform such as of the incidence of local taxation would stop the nonsense

We are certainly confirmed in this impatience when we look over the wall at Rotterdam and Hamburg

So in both the civil and the criminal parts of my lectures I have tried to see whether social objectives in themselves not very complicated and whose virtues are not really the subject of controversy are being in any way frustrated by some inadequacy of method or of procedure or by legal doctrines no longer efficacious in a changed society One of the most obvious ways of finding an answer to that question is to consider how similar problems are dealt with in countries which have fundamentally the same social objectives in view whether they make a better shot at attaining them than we do and whether their legal systems have anything in them which we might usefully adopt ourselves Conversely and incidentally one thing will become quite plain world civilisation owes to England—and as a Scotsman I am very ready to acknowledge this in some of the particular fields I am dealing with—a debt of gratitude if not for originating then certainly for fostering and distributing the idealism which all now recognise under the term The Rule of Law

You will see one thread running through nearly all the topics I have to deal with It is the element of the competition the tug of war the dichotomy between two mutually antagonistic elements in the same problem We are going to begin by looking at the question of compensation for loss arising from personal injury Here we shall see on one hand the legal concept of liability limited by fault which concept stands no less on a moral or ethical footing than the social demand for compensation for the victims of accidental injury this we shall see standing on the other hand Within this quarrel there will be minor dissensions for example

between the duty of statutory undertakers to prosecute their purposes as laid down by Parliament and the consequences which ensue when other people suffer from these purposes The impact of modern techniques upon laws geared to an older system has given rise also to conflicts which are yet to be resolved

It is the same in the area of the criminal law Here we see embattled the state (as representing the affronted victim of a breach of the criminal law) and the citizen namely the individual upon whom the state proposes to lay responsibility for the breach together with its attendant punishment In each phase of criminal procedure divergence between these two antagonisms calls for control by careful checks and balances These conflicts are common to all civilis d legal systems and I hope it may be found that from time to time the correctness of our own conclusions can be confirmed or some ideas for improvements may be discerned by looking at other people s law

Part I

THE CIVIL LAW

I

Liability Based on Fault—A Study in Obsolescence

Mrs Scott and Mrs Brown are neighbours in a local authority housing estate Both are widows and each has young children Their children are of school age and Mrs Scott goes out to part time work only so that she can devote the rest of her time to looking after them She is able to do this because she has a small but comfortable private income derived from invested capital The family is also supported by a trust fund which has been set up by the investment of capital in favour of the children and this will come in very useful for helping with their higher education and with what is called in the ante nuptial marriage contracts of the well to do their advancement in life

Mrs Brown s lot is less happy She goes out to work all day because a combination of part time work and National Assistance would not enable her to bring up her children as she wishes to and as her husband would have liked This although the neighbours are very kind and keep a bit of an eye on the children when they come out of school is not altogether satisfactory There are already indications that the children from lack of a full home life are inclined to be at a loose end and to get into company which their mother rather views askance Life is hard for Mrs Brown and as for her children—well we can only hope for the best

There is this fortuitous similarity between Mrs Scott and Mrs Brown each lost her husband in a road accident Mr

Scott was walking on the pavement when he was struck by a motor-car which being driven a little too fast on a slippery surface got out of the driver s control Mr Scott was killed instantly Mr Brown was travelling in a bus on a suburban road when suddenly an elm tree fell on to the roof of the bus and injured Mr Brown so severely that he died after many months of painful incapacity The day was fine there was nothing exceptional about the wind but it was blowing in strong squally gusts from time to time The tree was a large well grown elm between 120 and 130 years old After it fell it was found that three of its roots were badly affected by a disease known as elm butt rot the disease was of long standing There was nothing to indicate by external examination that the tree was in any way diseased and even if the trunk had been bored it was very unlikely that the existence of the disease would have been discovered [1]

The driver of the car which killed Mr Scott although not criminally liable had no answer to a civil action of damages against him and his insurance underwriters settled with Mrs Scott for a substantial sum in name of *solatium* (or compensation for her grief) and future loss of support while payments were also made by the insurers in respect of the children s claim under the same heads to a guardian who holds the sums in trust on their behalf Mrs Brown how ever was advised that in accordance with a well known House of Lords decision [1] no action would lie against the occupiers of the land on which the tree had stood they had neglected no precaution which could be expected from a reasonable and prudent landowner because there was

[1] *Caminer and Anr* v *Northern & London Investment Trust Ltd* [1951] A C 88 92 99

nothing dangerous in the appearance of the tree no sign of disease advanced age disproportion of crown to stem, or rising roots [1] It was obvious that the bus driver was in no way to blame for Mr Brown s death and accordingly there was no source to which Mrs Brown could look for compensation for the loss of her husband

This little piece of imaginary social anthropology occasions no surprise whatever to a lawyer [2] The lawyer indeed would be ready with even more subtle instances Mr Scott and Mr Brown would have been miners Mr Scott would have been killed by the momentary forgetfulness of a machineman in the pit while Mr Brown at the end of a long and exhausting shift would have inadvertently stepped in front of a moving hutch whether or not he was to blame himself certainly no one else was Or the two men would have been shipmates in a British ship both killed by the carelessness of the bosun Scott in the port of Glasgow Brown in the port of Takoradi where at least until long after it was abandoned in Britain the doctrine of fellow servant still flourished [3] In both these instances the respective situations of Mrs Scott and Mrs Brown would be the same as they were in mine

It is not that the welfare of persons who suffer damage or a bereavement is of no interest to lawyers in general On the contrary questions of this character as we all know occupy a great part of the time of solicitors advocates and judges The rights of an injured party the extent to which those rights have been invaded and the rough calculation of

[2] Lawyers are referred to Professor Jolowicz s paper Liability for Accidents A Suggestion for Reform presented to the Commonwealth Bar Association Sydney 1965

[3] See *infra* p 35

the sum which will provide compensation for that invasion so that the victim shall be restored *ad integrum* are all sub jects of anxious consultation skilful presentation and con scientious decision But observe that all depends upon the identification and evaluation of rights the right of the injured party to compensation upon the emergence of a proved dereliction of a duty namely a duty which the law has imposed upon the person who has caused the loss And since in our law the rule of evidence is that the burden of establishing a noxious invasion of the pursuer s rights lies upon the pursuer one is entitled to say that the law is looking primarily to the protection of the defender from claims which are unjustifiable that is claims which are not founded upon some breach by him of a positive duty which he owed to the party complaining The defender goes free as he would in a criminal prosecution unless the pursuer can discharge the burden of bringing home to him a breach of duty owed by one to the other this must involve in at least some degree a presumption that if A is injured by an act caused by B B is prima facie not answerable to A for the consequences since such liability is contingent upon the proof by A of facts and circumstances additional to mere causation and authorship

It is no more than putting the same proposition in a different way if one says that primarily and as far as concerns original principles at least the whole of the law of reparation like so much else in our law depends for its intellectual con tent upon some kind of ethical consideration The concept is one of an obligation to indemnify depending upon a moral duty He who unlawfully causes injury to his innocent neighbour *ought* to recompense him and the use of this

expression involves an admission that there is some code of behaviour to which the injurer can be expected to conform This code consists however not in an obligation to relieve distress but in an obligation to make good the consequences of wrongdoing which is narrower than the mere causation of loss I injure my neighbour when I open a rival shop next door when I a Sheriff's Officer seize his goods in execution when I give to his prospective employer an accurate account of his bad character In none of these acts do I do wrong and the moral code does not oblige me to make compensation in order to restore him to his former condition [4] The code begins by laying down a minimum of behaviour which can be expected of me namely that I will take reasonable care to abstain from unlawful acts or omissions which may be expected to harm my neighbour in the widest sense of that word the lawfulness or otherwise of such conduct will depend for the most part upon whether the activity which may cause damage is one which could be carried out in such a way if the operator took reasonable trouble to do so that it would not cause that damage And an act which if done in the exercise of a right or the discharge of a duty would be lawful if done for the purpose of injuring one's neighbour becomes unlawful since the injury is consequent neither on the exercise of a legitimate self interest nor on the promotion of the legitimate interests of others nor is it one which is unavoidable even by the taking of proper care Thus in Scotland what would be a lawful use of my property

[4] In 1737 Allan Ramsay's Playhouse in Carrubber's Close was Banned by the Kirk and interdicted by the magistrates He had recourse to law but received only the puzzling and comfortless verdict that though he had been damaged he had not been injured —*Old Edinburgh Club* Vol XI p 163

becomes unlawful if it is dictated by a desire to damage my neighbour rather than to benefit myself I am for example entitled to extract the water under my land for my own requirements but not in order to spite my neighbour by drying up his well[5] The law as to this is otherwise in England though in that country also as I suppose in most others certainly in Scotland the doctrine is at the bottom of much of the law of defamation I am not called upon to compensate my neighbour for the untruth I tell about him if I told it in the legitimate interest of myself or of others on the other hand if the lie is motivated by a desire to injure him which motive the law calls ' malice I am liable for the damage of his reputation

The use of the word malice like the use of the word fault is incompatible with moral neutralism It is an ugly word and in some systems means the guilty mind which is the essential feature of crime properly so called in the same way the ordinary use of language does not permit us to say of an act 'It was his fault that he did that simultaneously with What he did was lawful Negligence too in the sense of neglect of duty is an attribute of a wrongdoer the man who by his neglect of duty causes injury to another has done something to be ashamed of The relationship as it was understood in the nineteenth century has been clearly put by an English judge as follows It would not be correct to say that every moral obligation involves a legal duty but every legal duty is founded on a moral obligation A legal common law duty is nothing else than the enforcing by law

This involves respectful disagreement with an *obiter dictum* of Lord Watson in *Mayor of Bradford* v *Pickles* [1895] A C 587 See Kames *Equity* 4th ed p 42 and Smith *Short Commentary on the Law of Scotland* p 530

of that which is a moral obligation without legal enforce ment [6]

At this point we are obliged to record a distasteful fact namely that by our law there *is no positive* duty of giving assistance in time of need even where so to do would involve us in no measurable risk (I exclude the special relationships of parent and child schoolmaster and pupil and so on) The classic presentation is this that an able bodied man seeing an infant drowning in a puddle six inches deep is under no legal duty to come to the rescue That he is under a moral duty has been made plain at least in Scotland when a boy was injured in trying to stop a runaway truck from striking his companion it was held that the defender through whose fault the truck broke loose was liable to him in damages since he ought to have foreseen that the boy would obey his moral obligation to come to the rescue [7] In France however a better view is taken and the spectator of the drowning child could be held to have committed the *delit de non assistance a une personne en peril* [8] This involves a criminal liability it is true but as we shall see later on a person civilly damaged is entitled to intervene in a prosecution arising from the damaging act in order to obtain reparation

Much controversy surrounds the question, important only to legal historians whether and if so in what sense there ever was a rule of absolute liability for injury consequential upon the activities which a man carries on sometimes des cribed as the doctrine of a man acts at his peril ' Although as we shall see later this concept was to some extent re-introduced in the last century as the common activities of

[6] *The Queen* v *Instan* [1893] 1 Q B 450 *per* Coleridge L C J at p 453
[7] *Wilkinson* v *Kinnell Coal Co* (1897) 24 R 1001
[8] *Code Pénal* Art 63 (1954)

the common man especially his part in industry and trans portation began to involve risks to others which were higher than in less complicated times this is not a matter which need detain us now It is however perhaps worth observing that paradoxically there is a certain callous or ruthless feature in what at first sight would appear to be the doctrine more in favour of potential victims The doctrine 'a man acts at his peril has in a sense a lower moral content than the doc trine of no liability without fault the former may imply a licence to carry on your activities in any way most con venient or profitable to yourself provided that you don t mind paying for the consequences The damage which you inci dentally cause to your neighbour becomes as it were, part of the cost of production On the other hand under the doctrine of 'no liability without fault the injurer must be supposed to concede a duty to avoid committing the moral wrong of damaging his neighbour and his conscience for he must be supposed to have one prohibits his merely adding the com pensation payable by him to his overheads If he *has* done his best always supposing that to amount to taking reason able care no compensation is payable at all Virtue has not only been its own reward but has been commercially advantageous

This contrast is not of course a clear one The employer of industrial labour or the driver of a motor car is neither moral nor immoral all the time being just like other humans Sometimes he does not do what he ought and his fault is com mitted because it is worth his while His prospects of a larger profit or his being in a great hurry coupled with his invariable practice of covering himself by insurance will induce him to take risks the prize being substantial and the

he is judged by what the reasonable man ought to foresee corresponds with the common conscience of mankind? [10]

The latter of these observations leads us to look at one respect in which the moral basis of liability has been found to be inadequate and has therefore been modified The common conscience of mankind would not tolerate a man being blamed for what he cannot help Let us suppose that reasonable attention to the safety of the public demands that a certain door on a man s property be kept shut at night The man is in the habit as a routine of closing it at 6 p m One evening everything goes wrong for him He is suffering from influenza with a high temperature he has experienced a disastrous business loss that day his wife has run off with another man he is not a very adequate personality anyway and the cumulative effect of these misfortunes is that he for gets to shut the door so that a passer by suffers injury The moral code would not condemn him because forgetfulness would not be blameworthy in that particular man in that par ticular condition But this is not satisfactory to the law and indeed it would not be possible to do justice in actions between man and man if at the root of the question there lay a subjective investigation into personalities An arbitrary or average standard of performance is therefore laid down with relation to the requirements of this particular gate and attached to an imaginary figure the reasonable man The omission of the inadequate proprietor is then measured against the average standard and he is blamed or acquitted according not to his own abilities but to those of the average man But his failure to satisfy the test will involve him in no moral criticism at all And the point becomes even clearer

[10] *The Wagon Mound* [1961] A C 388 423

when the issue is as it so often is whether the consequences of an act or an omission would have been foreseeable by a reasonable man How can a man be morally to blame for failing to have the prescience of a brighter intellect than his own? [11]

Let me give another example I employ a man to drive my delivery van One day while on the job he drinks too much and by his culpable negligence injures a pedestrian The moral blame upon him is clear and so is the civil liability to compensate his victim but since the common experience is that he has no money, that will not be of much value In accordance with most systems of law therefore I also am found liable to the victim under a rule which is proverbially stated as *Respondeat superior* or *Qui facit per alium facit per se* and is no doubt traceable to the days when a man was held responsible for what was done by his slave The second of the proverbs I have quoted seems hardly applicable since it is not reasonable to say that I through another had too much to drink and drove on the pavement All that I did through another was to make delivery of my goods It is quite certain at all events that there is no conceivable moral code which could suggest that I have done anything to be ashamed of A striking instance is that of the dishonest servant who cheats his master s customers to serve his own ends which are not only not coincident with those of the master but are actually detrimental to them If the cheating is in a matter which it is within the servant s scope to deal with the master is liable [12]

[11] Ehrenzweig Negligence without Fault University of California, 1951

[12] *Lloyd v Grace Smith & Co* [1912] A C 716

This point is very well illustrated by a glance at the German Civil Code Article 831 which is as follows A person who employs another to do any work is bound to compensate for any damage which the other unlawfully causes to a third party in the performance of his work The duty to compensate does not arise if the employer has exercised ordinary care in the selection of the employee and where he has to supply appliances or implements or to superintend the work he also exercised ordinary care as regards such supply or superintendence or if the damage would have arisen notwithstanding the exercise of such care' This provision which is said to be unique in European codes at least [13] is interesting as an assertion that no moral culpability and therefore no liability attaches to a man merely because he is ill served by his employees It is otherwise however if he exhibits blame in failing to use ordinary care in their selection equipment or supervision It is rather curious that the liability for the actings of a servant is laid upon the employer subject to one exception as if to show that the proper discharge of the duty of care to select is regarded as necessary to negative an otherwise existing liability for the consequences of mere employment looked at from the point of view of ownership and control Thus absolute liability is laid upon an owner to compensate for any damage his animal may do and at one time this even extended to damage done by game belonging to a defender if it was done on land over which he did not have the sporting rights [14] The logic of all this is compatible with an ethical approach to negligence

[13] *Netherlands International Law Review* (1963) Vol X p 146
[14] B G.B 833 835

though it is not surprising that in most other codes logic has been forced to make way for provisions more humane

The proviso to Article 831 has been subjected to a good deal of criticism and without going into details it is enough to say that The courts have made it progressively more difficult for the employer to invoke this defence successfully [13] It is interesting in passing to notice how a codified law which one might have been excused for thinking displayed the qualities which are its principal attraction namely relative immutability and a precise formulation becomes in a comparatively short time unintelligible without reference to the mass of judicial interpretation to which it has given rise This is perhaps even more so of the French than of the German codes but in both instances their simple straightforward statements of principle may be as sybilline as the words arising out of and in the course of the employment " of blessed memory The point I am making however is that inevitable pressure on the courts has had the effect of modifying the logic of the doctrine of liability for fault in the moral sense I must also emphasise what I shall later deal with that this doctrine does not in Germany give rise to liability in the employer to compensate for the actings of a badly selected or unsupervised worker if the victim of them is another employee Damage of that kind is dealt with in a different way

French law seems to handle this question by regulatory rules of evidence yet the results are said to be justifiable on grounds of moral principle There were originally four instances in which one person was liable for the actings of

[13] Von Mehren *Civil La System* p 435

another parents for their minor children living with them school teachers for their pupils while under their care artisans for their apprentices and masters for their servants The liability of school teachers has now been superseded but it proceeded on the same basis as that of parents and artisans namely that the children s wrongdoing must be ascribed to fault consisting of failure in upbringing and correction In all these cases however the fault is only a rebuttable presumption and it is a good defence that the guardian could not have prevented the damage This is not so in the case of master and man where the presumption is irrebuttable Once fault is found in the servant the master has no defence When it is attempted to justify this position in relation to the conventional view of fault the reasoning is not convincing It is suggested first that the rule will cause masters to look after their servants better but the unreality of this notion will be obvious to anyone who has had experience in cases of vicarious liability Secondly it is said that 'the person who stands to profit by the servants activities should bear the losses occasioned by those activities [14] There is something in this as I shall try to show later but the proposition is crude or even fallacious as a justification for imputing to a master liability for his servant s fault The benefits of a successful undertaking are by no means confined to the proprietors Conspicuously in the case of public activities and in fact in the case of every lawful enterprise society stands to gain Above all the servants themselves are vitally interested in the profitability of the business more so indeed in the case of a limited liability company than many of the shareholders to one

[14] Amos and Walton *Introduction to French Law* 2nd ed p 227

class profit means livelihood to the other rise or fall in the value of a single investment in a portfolio The idea that the cost of compensating the victims of industrial accidents or accidents caused by persons carrying on business for gain should be a charge against the cost of production is unsupportable unless as a recognition that losses should fall on those best able to bear them regardless of any considerations of what at the risk of begging the question I will call justice

That the law continues to grope about for some hard standing on a moral foundation in this aspect can be observed from the development of the Soviet conception of fault Paragraph 403 of the Soviet Civil Code was interpreted by a commentator in 1924 as follows The plaintiff must show that the injury was caused by the defendant Beyond that he need not show anything [17] The whole idea of allowing a defendant to escape liability by showing that he was not at fault as of course our requirement that the onus of proving fault lies on the plaintiff was dismissed on the perfectly intelligible ground that the innocent injured is still more innocent than the innocent injurer This appears not to be the interpretation favoured today Section 403 absolves the person causing the injury if he proves that he could not prevent the injury But if he could prevent the injury and did not do so it means that he either caused the danger on purpose (malice) or did not display sufficient care to avert it (negligence) [18] Apart from an inversion of the *onus probandi* as compared with our system the Soviet

[17] Goikhburg and Koblents *Commentary on Civil Code* 1924 p 87
[18] Argarkor and Gankin on *Civil Law* 1943 Vol I p 325

code appears to be based upon the same philosophic foundation as that of other civil and common law jurisdictions

So far we have noticed some instances in which the inadequacy of the obligation of the injurer to compensate *in so far as it is based* on the classical view of negligence has been recognised with the consequence that the law has extended the protection given to the injured persons by enlarging the scope of the injurer s liability far beyond the boundaries of moral fault In the same way but in this instance for the protection of the *injurer from the* crippling consequences of his wrongdoing in a certain conspicuous mercantile respect the full rigour of the doctrine has been relaxed From an early date on the Continent and since 1733 in British Admiralty proceedings the shipowner s liability for loss of cargo by the theft of the master or crew was limited to the value of the ship and freight and in 1813 this limitation was further applied to damages arising out of collisions at sea These values were afterwards fixed at conventional sums [11] calculated upon the tonnage of the vessel at fault in order to avoid the expense of disputes about them the motive underlying the legislation was never concealed It had long been recognised on the Continent that a merchant could not afford to trade if he were under an unlimited liability in respect of his ship extending to his whole fortune and once the doctrine of limitation was recognised by her commercial rivals the shipowners of Britain who remained under unlimited liability at common law were at a serious disadvantage Here again therefore the application of legal principle was forced to give way to what are political or social requirements

[11] Sums which now require upward revisal

The eighteenth century also saw the development of the Industrial Revolution or as it might in this context be more appropriately called the Engineering Revolution This inevitably gave rise to a weakening of the doctrine of liability as a consequence of negligence because it became necessary to provide for a more equitable or socially desirable distribution of risks connected with the new works Most of the great civil engineering works were in any case irreconcilable with the private law of relationship between a man and his neighbour I am not entitled to insist on buying my neighbour s orchard because it grows better fruit than mine and at common law neither am I entitled to do so because I want to turn it into a railway embankment But it was universally recognised as is obviously the case that the works were going to do much more than make profits for the undertaker they were going to contribute in a wonderful degree to the national prosperity This at least was the comfortable utilitarian doctrine and to this day one is hardly permitted to dispute that it is in the National Interest to turn the whole countryside into a Dagenham or a Detroit For the exercise of compulsory powers Parliamentary authority was required and since in the granting of these powers the legislature was consciously trying to strike a fair balance between conflicting private interests it was natural that great inroads should be made into the existing law In so doing the answers of the old law to the question "Who should pay for A s hurt?" were not always acceptable and there was no reason why fresh solutions should not be adopted We will look at some of these solutions and the attitude the courts took up to them because it is obvious that we are right now in an era of

technical revolution so we must not be surprised if right now we ought to be critically examining the old common law answers all over again

The first example is one in which Parliament conferred on the undertakers of works certain privileges for the protection of those works which the law would not other wise have afforded them By section 74 of the Harbours Docks and Piers Clauses Act 1847 the owner of a vessel doing damage to a harbour is responsible to the harbour authority for the damage whether caused by negligence or not This old statute being a Clauses Act was designed to form a code for the regulation of the legal rights of all harbour undertakers who when they obtained their own local Acts would incorporate in them the provisions of the code In December 1872 the s s *Natalian* ran into bad weather near the mouth of the Wear She went ashore at the entrance to Sunderland docks at low water, and the whole crew was taken off by rocket apparatus As the tide rose the unmanned vessel refloated canted round and struck the pier doing damage to it The harbour authority sued the shipowners for the cost of repair maintaining that the Clauses Act laid upon them an absolute liability without proof of negligence In the end the House of Lords [20] rejected this claim upon various grounds not easy to recon cile the Scottish member of the House Lord Gordon dissenting It is not necessary for me to weary you with an attempt to find a *ratio decidendi* this exercise occupied much of their Lordships time in another case I am going to refer you to It is enough for me to point I hope not

[20] *River Wear Commissioners* v *Adamson* (1877) 2 App Cas 743

unfairly or disrespectfully to what I am persuaded was th[illegible] motive whatever the reason for the decision and you can find it in the speech of Lord Cairns It would be difficult to suppose that by means of ordinary and routine clauses inserted in private or local Acts the legislature could intend to create a new right and a new liability to damages unknown to the Common Law This I think is the raising of an august standard of revolt the conscience of th[illegible] nineteenth-century common lawyer would not readily allow of a statutory obligation to pay damages being imposed upon someone who so far from being morally to blame was a sharer with his adversary in a common misfortune

You can find another example—the facts are of no importance in the judgment of Brett J in *Hammond* v *Vestry of St Pancras*[11] It would seem to me to be contrary to natural justice to say that Parliament intended to impose upon a public body a liability for a thing which no reasonable care and skill could obviate" This view could [illegible] possibly be held today It is very close to that expressed by Lord Hermand nearly 100 years earlier when his brother Lord Meadowbank had quoted a statute whose terms were inimical to the view Hermand had formed A statute?" he exclaimed What's a statute? Words [illegible] words! and am I to be fettered down by words? No, my Laird, I go by the law of right reason"

[illegible] times change and [illegible] to the layman every [illegible] [illegible] provisions of the Harbours Clauses Act came once more before the Lordships On a wild night in 1921 the [illegible] was [illegible] in the Swansea Docks

[illegible]

The master for good seamanlike reasons as all the courts so found was moving with an anchor down and in the course of doing this he dredged up and fractured some electric cables belonging to the dock undertakers The House of Lords [23] by a majority of three to two held that the owners of the ship were liable to make good the damage although in the absence of any negligence on the part of the master This pair of cases *Adamson* and *The Mostyn* is of unique interest to those whose duty or inclination it is to consider the doctrine of judicial precedent with special reference to the rule of *stare decisis* as it used to be applied in the House of Lords and so I dare say they give rise to a good deal of sardonic amusement on the part of my friend and colleague Professor T B Smith I will only say this that by 1928 the House was no longer troubled by the need to admit that the legislature had abrogated the common law all that was required was the intellectual athleticism of coming to a right conclusion in face of an apparently irreconcilable yet binding decision of the House in the opposite sense

I will round off this point by referring to a later case dealing with an even earlier statute The Peak Forest Canal Act 1794 provides that if any damage be done to any land by the breach of any of the waterworks of the particular navigation or from any other accident full compensation should be made to the owner and occupier In 1943 the Court of Appeal had no difficulty in deciding that the undertakers must pay for damage done by the collapse of an embankment caused by a violent storm even though the storm was such as to amount to an act of God By that

[23] *Great Western Railway Co* v *Owners of s.s Mostyn* [1928] A C 57

is meant that the flooding was so unprecedented and unexpected that human agency would not reasonably anticipate it or be bound to take any steps to meet it [24] This definition may be taken to represent also the law of Scotland [25] And it may be worth incidentally observing that it appears also from a House of Lords decision to be the law that no rain of whatever intensity can be accepted as an act of God if it fall in the Burgh of Greenock [26] The *Peak Forest Canal* case is another instance of a slightly different order of public policy demanding that Parliament impose strict liability without proof of negligence this time upon the owners of public works in favour of adjoining proprietors they are deprived by the legislature even of the defence of Act of God which would have been available at common law to the keeper of a wild animal which escaped out of his control

All this is commonplace to the professional lawyer but my present audience I am sure will appreciate that I quote these cases in order to indicate the weaknesses in the doctrine of no liability without fault These are not weaknesses in the moral position which lies behind it the point is that for say two hundred years society through the acts of the legislature has from time to time been forced to admit that an ethically unassailable doctrine may have to be modified for public ends of which examples are the convenience of commerce the security of property and the avoidance of injustice to the poor

[24] *J J Makin Ltd* v *L.N.E Railway Co* [1942] 1 K.B 467 470
[25] *Rothes Countess of* v *Kirkcaldy & Dysart Water-Works Co* (1882) 9 R (H.L.) 108 7 App Cas 694
[26] *Caledonian Railway Co* v *Corporation of Greenock* 1917 S C (H.L.) 56 [1917] A C 556

Of course in the business sense these variations upon legal themes are of less practical than philosophical importance The burden of an accident of the kind we have been looking at does not fall catastrophically upon a ruined shipowner or upon a bankrupted canal proprietor Risks like this are spread by insurance But when we come as we are about to do to look at this aspect more closely we must bear in mind that the community has a stake in these undertakings—that is why they succeeded in getting Parliamentary powers—so that if some of the burden of insurance should fall on the community as a whole there will be nothing unjust about that Nor ought we to forget that the problem we set out to solve was that of Mrs Brown and her family Nothing we have discussed so far has been any help to them

II

PRACTICAL REMEDIES TO REPLACE LEGAL DOCTRINES

THERE is no judge no practising lawyer and no intelligent member of the public who is prepared to accept the sound ness and approve the efficacy of all the doctrines of the law current at any particular time We need not as lawyers be surprised at this or feel ashamed of it Law must always lag behind a bit because one of the first things we demand of our system is that we must know where we stand We want to be able to plan our relationships with our partners our customers our wives the Inland Revenue and the police on the basis of a body of law which is stable rather than ephemeral So change takes time and therefore at any given moment a lot of the law is ideally out of date How long it takes to effect a change could make in relation to any specific problem an interesting study for a legal historian as he traced the course from the first mutterings of discontent through the gathering movement for reform up to the final triumph of amendment—for the time being On that footing let us look at our own problem again We began by noticing what appeared to be inequitable consequences attending two respective incidents each producing its own victims and we noticed that the consequences to the victims were *quite dissimilar although looked at purely physically* the incidents had a good deal in common We considered the legal explanations for these differences and noticed that in most countries at some time or other it had been found necessary to modify if not to abandon the doctrines of the

law which underlay the results at least in their full logical vigour

We are now to look at some more advanced proposals for distributing a more even handed social justice Some have been implemented and a few of these I will cite as examples Some are still in the air I do not know when they were first ventilated but I have been struck by the following quotation[1] The report leaves little doubt in the reader s mind that the present methods of dealing with the problem of automobile accidents not only fail in most cases to provide proper compensation when compensation is due but are productive of other results which are socially undesirable The Commission favors the adoption of a plan of compensation with limited right of recovery and without regard to fault analogous to that provided by workmen s compensation legislation to be guaranteed by insurance and administered by a commission The striking similarities with respect to the natures of the problems the social results thereby produced and the solutions proposed cause one to wonder whether this report foreshadows an impending development in the law looking towards a more scientific distribution of inevitable risks which are incident to an important and necessary activity in modern society

The Report referred to was prepared by a Committee to Study Compensation for Automobile Accidents set up by the Columbia University Council for Research into the Social Sciences and the first thing to which I draw attention is that it was prepared in 1932 So a generation ago proposals were being made to replace in some degree at least com

[1] *Columbia Law Review* Vol. xxxii p 786

pensation limited to damages arising from negligence by payments out of a publicly administered insurance fund

The second point of interest is the analogy which was then drawn between the automobile proposals and the existing law as to workmen s compensation this in its turn was regarded as being merely a special case of scientific distribution of *inevitable* risks which are incident to an *important* and *necessary* activity in modern society The use of the words I have italicised firmly excludes the attaching of any relevance to the idea of fault he whose *necessary* actions *inevitably* cause injury cannot be blamed for the injury they cause and society cannot ask him consistently with what we call justice to be at the sole expense of indemnifying the victims The extent to which he can be directed to contribute will depend upon other factors in which might be included first the special profit he enjoys or the individual convenience he extracts from the neces sary activity such as owning a factory or driving a car and secondly the general benefit that he derives as a member of the public from the additional amenities which the activity promotes to the advantage of all On this view there can be no resting place at road accidents or industrial injuries If inevitable risks are to be scientifically distributed this is probably going to mean taking care of all those who suffer from them by the most obvious method of distributing risks that is insuring all who are exposed to them

Nor will it be satisfactory to stop there we shall at once be asked the question Why is relief to be afforded only in cases where A has suffered in consequence of or in connection with some activity of B? What in fact are we going to do about Mrs Brown? We cannot say that

there is an automobile accident when a tree falls on a motor vehicle and crushes the passengers The accident is in principle indistinguishable from a tree falling upon some one walking on the pavement or upon a dwelling house And we can hardly say that the passive owner of a tree which is apparently in perfectly good health is engaged in an activity which causes injury It is beginning to look as if we have on our hands once we start talking about the scientific distribution of the risk of being injured through no fault of one s own a search for some kind of acknowledg ment by society that one of the costs of living the overheads of community life is the relief of distress in these cases amounting in sum to the same kind of indemnification as *the law now provides when the innocent victim is damaged* by the fault of another

But already I can sense the objection of the attentive listener— Why does he use the expression 'through no fault of his own or innocent victim'? Surely if this kind of relief is a general obligation on society we have no right to divide the victims into sheep and goats reserving the benefits to the uses of those whose conduct we approve and consigning the others to penury We have stopped looking round for a morally blameworthy causative agent Have we still got to make ethical judgments about the com plainer? This question is not an easy one Until fairly recently (1945) the law in both England and Scotland was that if a pursuer was himself guilty of negligence which was itself jointly causative of the accident along with the negli gence of the defender [2] the pursuer was altogether precluded from recovering damages from the defender It is not

Robinson v *Hamilton (Motors)* 1923 S C 838

necessary to make any attempt to rationalise this doctrine which led to manifest injustice The odd thing is that it has never been tolerated in Admiralty if two ships collided through the negligence of both the degree of blame has always been apportioned by the court to each and the damage arising adjusted accordingly This is now the rule in ordinary actions of reparation One can easily see the basis of this rule if the defender is to be found liable in consequence of his fault no one could justify finding him wholly liable for something which the court has found was not his fault alone but at least in part that of the complainer But if fault of the defender is not to be the basis of compensation what on earth has the fault of the complainer partial or even entire to do with it either?

So to help us to answer these questions we will look at the progress of the ideas behind them not only in this country but also abroad To begin with I will quickly recapitulate some of the respects in which we noticed earlier the doctrine of no liability without fault as having been departed from (a) the objective comparison of him who caused the injury with the reasonable man (b) the liability of an innocent employer for the negligent acts of his servants (c) the protection given to works carried out under parliamentary powers (d) the obligation of certain undertakers of such works to compensate without proof of negligence Going on from that point we observe that the technical developments of the new age caused the doctrine to become more and more obsolescent new inventions brought new dangers and mechanical contrivances could make the consequences of accident at least on land more disastrous than ever before It is not surprising that there was a demand

for protection for injured persons which would be more certain and less limited in scope than was available under the old doctrines of no liability without fault even where the burden of exoneration lay upon the defender In many countries therefore that rule suffered erosion It is perhaps worth mentioning a sad exception Scotland into whose jurisprudence was introduced by the House of Lords in 1858 the English common law rule invented a few years earlier in England that an employer was not liable in damages for the injury caused to one of his employees by the negligence of another [3]

It was in Germany that the most remarkable developments took place In the various parts of 19th century Germany three major systems of law were in force French law based on the *Code Civil* the Prussian codification of 1794 (*Allgemeine Landrecht*) and the *Gemeine Recht* an adaptation largely carried forward by scholars of Roman law to modern conditions [4] In all these systems the rule was no liability without fault In two of the kingdoms Prussia in 1838 and Bavaria in 1861 the doctrine was found to be inadequate to the new technology and it was therefore provided either by legislation or by judicial decision that broadly speaking railway operators were absolutely liable for the damage they caused The Prussian law simply ignored the issue of fault [5] while the Bavarian *Oberste Landgericht* felt themselves able to decide that the operation of a locomotive on a railroad automatically and necessarily

[3] *Bartonshill Coal Co* v *Reid* (1858) 3 Macq 266
[4] Von Mehren *op cit* pp 415 416
[5] *Preussiches Gesetz uber die Eisenbahnunternehmungen* November 3 1838

entails culpable behaviour [6] The question however was dealt with on a federal basis by the *Reichshaftpflichtgesetz* of June 7 1871 which was wider in scope than mere railway legislation Article 1 provided that if in the conduct of a railway a human being is killed or suffers bodily injury the undertaker is liable for the damage arising therefrom except in so far as he proves that the accident was caused by *force majeure* or by the fault of the deceased or injured person This article has since been extended to cover electricity and gas undertakings where the only defence open is that the installation meets the recognised standards of engineering and is intact A somewhat similar liability has been imposed upon the drivers of motor vehicles If through the use of a motor vehicle a person is killed or the body or health of a person is injured or property damaged the holder of the vehicle [7] is liable to the injured person for damages arising therefrom [8] The only defence substantially is that the accident was due to an unavoidable event that is caused neither by a defect in the condition of the vehicle nor by failure in its mechanism It will be observed that the liability under this law is more severe than that upon the railway operator because it provides for injury to things as well as persons which the railway law does not

There are some specialties about this law (i) the liability is limited to a certain sum but a plaintiff can also sue under the ordinary provisions of the Civil Code when of course he would have to prove fault (ii) persons who are employed in connection with or are transported in the vehicle are excluded from this law and must prove negligence if they

[6] Von Mehren *op cit* pp 415 416
[7] A technical term of wide meaning including the owner
Gesetz uber den Verkehr mit Kraftfahrzeugen May 3 1909

are to substantiate a claim (iii) the driver is not bound by this law in so far as he may exculpate himself by showing he was not negligent

How the law was changed in order to meet new needs can be seen from that relating to liability arising out of the operation of aircraft In 1908 a Zeppelin made a forced landing it got out of control on the ground (as to which no special point was taken) and the plaintiff was seriously injured He sued Count Zeppelin for damages but was unsuccessful in the absence of proof of fault This decision was adversely criticised and the question is now regulated by statute* based upon the motor vehicle law but more stringent inas much as the operator is deprived even of the defence of *force majeure* and is faced with what amounts to an absolute liability His liability to passengers and its relationship with the Warsaw Convention is of course outside the scope of this lecture

After dealing with the liability of railway undertakers the *Reichshaftpflichtgesetz* provided by Article 2 that ' Anyone who operates a mine quarry pit or factory is if an authorised agent or representative or anyone employed in the direction or supervision of the undertaking or of the workmen causes by a fault in the carrying out of the service arrangements death or bodily injury to a human being liable for the damage arising therefrom This Article is more limited in scope than might appear First the burden of proof is not shifted to the undertaker Secondly the liability of the owner is only for failure in duty and that on the part of a certain class of servant the effect is really to extend the definition of

* *Luftverkehrgeset* 1922 1936 1943

undertaker to include representatives in a supervisory capacity so that the faults of management are to be imputed to the operator Thirdly it is again to be emphasised that the Article confers no general right upon a workman to sue his master in respect of the negligence of a co employee [10] This is dealt with in an entirely different way having been excluded from the law relating to rights and duties altogether and I shall be referring to this matter in a moment In the mean time I will just suggest that we may find that exclusion could be beneficial in the interests both of practical remedies and of rationalisation of legal doctrines were it replaced by a system of sufficiently wide application unconnected with the law of delict

In France after a good deal of controversy and contradictory decisions upon the interpretation of the relevant articles of the *Code Civil* the law stands at present upon the basis that fault is a necessary condition of civil liability [11] I understand however that consideration is being given to legislation which would impose an absolute liability upon the driver of an automobile which causes accidental damage [12] if this is passed it will not be unique To lawyers probably the best known example is to be found in the province of Saskatchewan [13] The basis of the scheme is the setting up of an insurance fund financed by premiums paid by the owners of vehicles and by the holders of driving licences The premium income is used to indemnify not only everyone

[10] Von Mehren *op cit* p 474
[11] Amos and Walton *op cit* p 203
[12] For French professional opinion on this subject see *Gazette du Palais* September 15 1965 reporting the Congress of the *Association Nationale des Advocats* especially the statement of Professor Tunc
[13] See *Journal of the Society of Comparative Legislation* Vol 31 p 39 and 13 C L P 100

including drivers passengers and pedestrians from the consequences of injury in an automobile accident but also owners of vehicles from losses arising from collision fire and theft The features of the scheme are (a) flat rates of premium (but varying according to the class of vehicle) (b) a limit to the benefits payable *e.g.* (in 1960) to $10 000 for one person and $25 a week for a maximum period of two years in case of total incapacity and (c) no exclusion of the common law right to sue for damages arising from negligence In fact as regards the last point the position is the same as in Great Britain where the law demands that a driver be insured against common law claims The consequence of the limitation of benefit is that actions at common law in supplement of the statutory insurance benefits are of constant occurrence Thus while compensation to some degree at least is the absolute right of anyone injured by an automobile which is not the case with us at the same time as under our law you are better off if you can ascribe your accident to negligence than if you cannot There seems to be no doubt that the scheme is effective and it is certainly not costly We are told that the proportion of premium income swallowed by administrative expenses is 17 per cent in Saskatchewan 30–40 per cent in Britain and 50 per cent in the U S A [14]

It is not surprising that the Saskatchewan system—which I will not examine or criticise in any greater detail—has been very carefully studied elsewhere A Committee examined the question in New Zealand in 1963 it was extensively discussed at the Commonwealth Bar Association Conference in 1965 The Lord Chief Justice of England made it the subject of his Presidential Address to the Bentham Club in 1965 there

[14] 13 C.L.P. 104

some striking points in that address [15] For example of every ten persons injured in road accidents only three are compensated This of course is one of the consequences of compensation being tied to negligence since many accidents probably far too many are classified as unavoidable But an even more powerful reason is the difficulty if not impossibility of proving after the elapse of what may be months or years that on a balance of probabilities the defender was to blame This will depend on the evidence of witnesses as to what exactly they saw perhaps in a split second of time long long ago Especially in Scotland with its uniquely rigorous insistence on corroboration the burden on the pursuer is hard to discharge Again the variations in the sums awarded make it all a bit of a lottery England is better off here than most of us Lord Parker is critical of judicial awards most common law countries have to put up with the inscrutable and oracular jury Finally the tribunal is supposed to make an estimate on a lump-sum basis of future and perhaps permanent loss of function or earnings this estimate can never be much more than a guess

Let us suppose then that it were determined that there should be a universal insurance against the damage done by motor vehicles both to persons and property which would provide indemnity without reference to liability under any existing doctrine of law Granted that the automobile accident being the most obvious and spectacular of the disasters to which the uninsuring part of the population is most likely to suffer why in fact should compulsory public insurance be confined to this type of risk? Why should it not cover the even commoner and sometimes more tragic kind of

[15] 18 C L P 1

the damage one ordinary servant s negligence may cause to another These doctrines can no doubt be explained by an inclination to strict adherence to formal reasoning but the second of them has had to be evaded by alternative statutory provisions while the first is now under heavy fire

The problem of compensation for a workman injured otherwise than by a management fault which would have entitled him to damages under the *Reichshaftpflichtgesetz* was dealt with by a compulsory insurance scheme which dates back to 1884 [16] It appears that it was part of what would now be called a package deal as Bismark put it the cure of social evils will have to be sought not only in the repression of Social Democratic excesses but also equally in the positive promotion of the welfare of the worker [17] Be that as it may there existed in Germany and was a model which was to a large extent copied in Britain between 1897 and 1911 a comprehensive protective insurance scheme covering industrial accidents as well as sickness and old age and as far as industry is concerned financed by contributions from masters and men The principles have been stated as follows The federal legislation is based on the idea that the entrepreneur who employs workers not only owes them the wages agreed upon but also has to bear the risk of accidents connected with the work The workers or their next of kin receive the amounts due to them from an institution upon which the duty of protection is incumbent this institution has no private law relationship with the beneficiaries but it performs a public administrative function Accordingly the obligation of the entrepreneur to

[16] *Unfallversicherungsgesetz* July 6 1884
[17] Von Mehren *op cit* p 425

make payments of indemnity is not a legal obligation towards the worker but a public charge imposed on the operation of an industry subject to insurance like a public tax By this financial obligation under public law the entrepreneur is freed from the private law liability for accidents towards his workers so far as such a liability is based on statutory provisions The only exception is the case when by the judgment of a criminal court it has been found that the entre preneur caused the accident intentionally In that case the injured party can demand from the entrepreneur the difference between his (private law) claim for compensation and his (public law) claim for accident indemnity [18] This system then has the same features which have characterised all others namely a provision by insurance which amounts to less than the indemnity which the Civil Code would confer and reservation to the injured party of what we would call his common law rights albeit these are in Germany res tricted to what must be the very rare case of intentional injury

But as I say the rigidity of the German adherence to the doctrine of no liability without fault which has caused the rejection of vicarious liability as incompatible with moral blameworthiness is undergoing criticism and when a system is being criticised that is just the time to look at it because then you can see the struggle going on between the contra dictory elements in such problems as this which I told you we were especially looking out for I may refer to a critical article on Liability and Warranty in the New German Doc trine of Unlawful Acts by Professor Joseph Esser of

[18] Laband *Das Staatrecht des Deutschen Reiches* (1890) p 264

Mainz.[19] Professor Esser examines the evolutionary trends in the matter of civil liability and classifies them as revolu tionary and counter revolutionary the first being reforms which have tended to develop the rules of the Code relating to unlawful acts in the direction of a warranty becoming gradually more and more absolute and the second being a move towards re establishment of principles of individual responsibility subject to a closer control of the general con siderations which make an act unlawful One extension of the law indeed and an interesting one is of a constitutional nature and I think one may safely suppose it to be consequent upon the public acknowledgement of the outrages which had been committed by the German Sovereign in the name of Government between 1933 and 1945 The global rights of the individual to personal dignity and individuality which are to be found in Articles 1 and 2 of the Federal Constitution of Bonn have been recognised by the *Bundesgerichtshof* as con ferring rights for example to protection against the invasion of privacy or commercial exploitation which are said to have been refused in the past by the *Reichsgericht* I do not want to go into details about this I will mention just two reforms which in 1961 were being proposed The first is the abroga tion of the exoneration of the master for the negligence of his servant under Article 823 which I have already referred to The second is inspired by the discussions as to the proper way of dealing with multiple damage done by say a nuclear catastrophe and it suggests that all commercially dangerous enterprises should be under a strict liability resembling that relating to motor vehicles and aircraft on the footing of the liability of the person in control for the risks arising from the

[19] *Revue Internationale de Droit Comparé* (1961) Vol xiii p 401

safety of things which he has introduced into industry or which he has made available to the public

On the other hand the counter revolutionary element of which I suspect the learned author forms part is dissatisfied with the empirical nature of a doctrine which has thrown away the objective standard of reasonable care in favour of the rule that conduct is unlawful when it passes the bounds of what is termed *Sozialadaequates Verhalten* or socially adequate behaviour' This expression says Professor Esser has had a great success in conformity with Faust s epigram *Denn eben wo Begriffe fehlen da stellt ein Wort zu rechten Zeit sich ein* [20]

Let us return to England and to the conflict between the competing elements which has forced law to admit its own social inadequacy My next and last instance is from out side the realm of personal injury and is in the first place intended to illustrate the irrelevance of the concept of fault as a guide to the just decision of a dispute arising out of a commercial relationship In the second place although we shall not have time to go into any details of finance or administration I believe that the commercial principles we are about to see in operation looked at along with the imperfect remedies we have been studying may give us a clue to the reconciliation of a rational system of law with an acceptable social equity

In the case of *Riverstone Meat Co Pty Ltd* v *Lancashire Shipping Co Ltd* [21] meat belonging to the plaintiffs had been shipped in the defendants ship under bills of lading subject to the Australian Sea Carriage of Goods Act 1924 By that

[20] It is just where ideas are awanting that a word comes in handy
[21] [1961] A C 807

Act and the Hague Rules to which it gives force the shipowner is liable for damage arising from unseaworthiness only if caused by want of due diligence on the part of the shipowner to make the ship seaworthy as to which the burden of proof is on the shipowner Just before the voyage the ship had been subject to a load line survey and for that purpose entrusted to Stephen of Linthouse ship repairers of the highest repute A marine superintendent employed by the shipowners managers had insisted on an unusually stringent survey This involved removing all the storm valves They were put back by a skilled fitter employed by Stephen This is in accordance with ordinary and prudent practice The fitter was negligent one of the storm valves leaked and that caused damage to the cargo The question was the ship being undoubtedly unseaworthy had the shipowners exercised due diligence? I refer to the speech of Lord Radcliffe

Now I am quite satisfied that treating the carriers as a legal person a limited company whose mind will and actions are determined by its officers and servants they did nothing but what they should have done as responsible and careful persons in the carrying business I see no ground therefore for saying that the carriers themselves were negligent in anything that they did But there is on the other hand a way of looking at the intrinsic nature of the obligation that is materially different from this It is to ask the question when there has been damage to cargo and that damage is traceable to unseaworthiness of the vessel whether that unseaworthiness is due to any lack of diligence in those who have been implicated by the carriers in the work of keeping or making the vessel seaworthy Such persons are then agents whose diligence or lack of it is attributable to the

carriers The carriers must answer for anything that has been done amiss in the work After elaborating this Lord Radcliffe goes on 'If one had to choose between these two alternatives without any background in the way of previous authority or opinion with regard to the interpretation of this section of the Hague Rules I think it would be very difficult to know which way one ought to turn What I think should determine this appeal however is what we know of the history of these words due diligence to make the ship seaworthy in connection with sea carriage of goods and what I regard as the settled interpretation of their significance

This implies a very interesting and for my purposes important attitude to the proof of negligence On the one hand the carriers had taken every precaution that anyone could suggest prudent carriers ought to take on the other it was alleged that they had failed to exercise due diligence inasmuch as having delegated the mechanical and surveying part of the duty—and shipowners are not ship repairers so can do no other—they are liable for the negligence of those to whom they delegated Were they to blame or not? Moral fault is out of the question and Lord Radcliffe did not find it necessary to attach some kind of notional fault which would have been as he indicates a matter of great difficulty if principles are to be kept to He did not ask the question What duty did the carriers owe to the shippers their neighbours to whom they owed a duty to exercise reasonable care and did they fail in it? but What promises did the carriers make to their customers and did they keep them? The question moves out of negligence and into contract out of the realm of a moral duty to take care of a neighbour and

into that of the prudent businessman voluntarily entering into onerous commercial agreements

In all transactions proceeding upon such agreements there is risk of loss by accident to one party or another and the prudent businessman covers the possibility of loss by insur ance He will often make his contract in such a way as to indicate what losses he is to insure against and what are to be left for the other party to cover Thus to pursue the *Riverstone* example if the contract provides for the ship owner being liable only for losses arising out of unsea worthiness consequent on his own lack of diligence that means that it is against those losses alone that he will insure leaving all other risks of the adventure to be covered by the shippers of cargo These matters are arranged on a purely business basis which may be nonetheless just and fair for having no moral content For example you may hear a motorist whose car is under comprehensive insurance com plaining of a garage which displays a notice Cars garaged at owners risk Unfair he says that I should be the sufferer for the negligence of the proprietor and his servants This of course is not so He garages in a public garage perhaps once a month and that fact will make no difference to his premium On the other hand the garage proprietor if he accepts liability will have to insure against the risk of fire caused by a small electrical fault destroying 100 cars on any of 365 nights of the year Business economy dictates who shall cover the risk This misunderstanding caused some rumblings of discontent on the Bench in a case in which the right of an internal airline to exclude their ordinary liability as carriers was being discussed [22] While it is

[22] *McKay v Scottish Airways* 1948 S C 254

generally agreed that the consumer is entitled to more effective protection than he now enjoys from the contractor who forces him to sign what is called a standard form contract' that is a contract the terms of which have been settled by the contractor himself on a "take it or leave it basis—the consumer must sign it or forgo what may be an essential service—in many cases the form of the contract reflects customary insurance arrangements which the parties have voluntarily entered into It is of course easy to criticise the almost universal condition which the operators of ferries include in their contracts of carriage namely that the passenger is at his own risk on the ground that a ferry is only to the passenger a portion of highway of a peculiar kind and that since it is notorious that no one ever looks at the conditions of carriage the consequence is that on this portion the passenger is left unprotected But what is he unprotected against? Not the risk of accidental injury or death In Britain these will not entitle him at common law and apart from contractual stipulations to reparation The only thing that will entitle him or his estate to be restored to the pre accident position is the carrier s negligence If negligence were not the basis of reparation the condition of carriage would be of no importance It is true that the passenger can insure against the consequences of the carrier s negligence as he can against loss from any other cause but the simple soul does not do so If there were universal provision for insurance not against the consequences of negligence but against the risk of any accidental injury the whole creaking ramshackle unworkable machine which is represented by the common law of delict tort or reparation could be abandoned without regrets

In its place I suggest that we think over a system based on business realities rather than on legal doctrines This means facing the fact that some people manual workers especially are more exposed to injury by accident than others and that if the risk of injury to one of them is to be spread so that it is not he and his family that suffer catastrophe it should be spread not over his fellow workers but over us all Since some industries are more dangerous than others and all are more dangerous than non industrial employment it is right that employers should contribute to the insurance fund possibly in different degrees according to the class of indus try And since of course the whole community benefits from industry a contribution could fairly be levied on the general tax revenue There is nothing original about this in fact it closely resembles the present system But let us extend it so as to include all injury by accident however caused and see how we stand In the first place we shall see that it will be possible so to arrange matters as to make actions of damages for negligence unnecessary and therefore to make our present insurances such as motor insurance and employers liability insurance largely irrelevant What we might propose would be a universal compulsory comprehen sive insurance—no contracting out allowed—which would insure a potential victim against loss instead of only a potential wrongdoer against claims While civil actions for negligence would disappear there would be much to be said for taking a severer view of faults such as dangerous driving or breaches of the regulations under the Factories Acts These matters would probably be dealt with in the criminal courts although it might be better to set up special courts to deal with such cases We have already seen that quite often

especially in industrial accidents no moral blame attaches to him whom the law finds liable in damages nevertheless the imposition of severe monetary penalties would have a salutary effect on prevention which is after all better than compen sation There is so far as I can see no reason why people should not insure against this liability as in fact they do today against the civil consequences of their fault The important thing is that any penalties inflicted should be paid into the insurance fund and not to the sufferer Whether there should be separate funds *e g* an industrial fund an automobile fund and a general fund is a fiscal administra tive or perhaps actuarial question which we need not here pursue

But if we are going to abolish the civil right to damages for negligence obviously we will have to put in its place something which effects in all cases of accidental loss what the old system used to do in a few cases namely restoration of the sufferer so far as money can do it to his pre accident position There is no technical difficulty in that You gear a man s contribution (and also his employer s and the state s contribution) to his average income and you pay out on the same sort of basis Here again there are innumerable administrative questions which obviously we cannot go into here Whether or not you are prepared to be overwhelmed by administrative difficulties or terrorised by *financial considerations raises really* a question of priorities What is required in the first place—and this of course raises political not legal questions—is a realisation that the social waste and unhappiness caused by all serious personal acci dents ought so far as possible to be made good and not only

in the cases in which someone other than the victim was to blame For some reason or other however it has so far been acceptable that such provisions for sickness or industrial injury benefit should be ineffective for most people above a bare subsistence level If under our present arrangements you want to live something like the life which you and your family enjoyed before you were struck down you must either effect a private insurance if you can afford it or you must arrange to be struck down through the fault of someone who is either insured or well to do The reparation which would be payable under a comprehensive insurance should surely be measured by the amount of the loss and by nothing else Clearly this would involve a contribution to the premium fund in respect of each person covered which would vary in accordance with his potential loss that in its turn would bear relation to his pre accident wages and to his post accident prospects

I would expect that the scheme would cover every even tuality except probably injuries deliberately self inflicted Should not the drunk man falling into a ditch on his way home receive compensation on the same footing as the man who loses a hand through the failure of his employer to fence a machine in his factory? Since fault is irrelevant there is no room for the idea of contributory negligence And since fault is irrelevant the whole content of the law of civil negligence delict tort vanishes overnight in so far as it affects personal injury I will leave to others the idea of compulsory insurance against damage by defamation as also the interesting question of how a visiting foreigner is to stand when he is injured in a road accident

It is essential that the compensation paid take the form of periodical and not lump-sum payments There would be an end to the degrading form of bingo session which we now describe as a civil jury trial in which the tribunal is invited to guess how long the present disability is to last and to capitalise the value of it by multiplying by some figure—any figure except as the judge will always direct such as could be justified on actuarial principles If complete recompense or something like it is to be guaranteed by reliance on a public fund it is hard to see much justification for providing further for damages in respect of pain and suffering or shortening of life These always had rather the air of penal damages about them that is an insistence that he who is negligent should be liable to the uttermost farthing But even cases of negligence are accidents we are all liable to accidents and I suggest we might grin and bear the peripheral consequences in so far as we are not out of pocket by them And most of us would be glad to see the end of the really horrible spectacle so popular in Scotland and in other countries too of grief stricken parents asking juries for cash payments in lieu of their dead children The loss of a child of tender years would of course involve no payment out of the fund except for funeral expenses

In another common law country the imminent break down of the concept of negligence as a useful regulator of the lives and interests of persons exposed to an industrial civilisa tion has been recognised I have been much indebted to an article by Dr Ehrenzweig entitled Negligence without Fault published by the University of California 1951 The learned author emphasises the exceptions and the extensions

to the doctrine of no liability without fault which are necessary in order to make it viable in modern society I do not find myself able to go the whole way with him in his conclusions probably because at my age one wastes too much time in studying an expression like negligence without fault and trying to evaluate it according to the logic of the system in which one has been educated Nevertheless the conclusions are impressive and I can best summarise them by quoting an imaginary judge s charge which the author suggests as appropriate in an action of damages under his proposals the first part is orthodox the second is decidedly not The defendant is liable for morally negligent causation of the harm if (a) he is *guilty of conduct which a reasonable man would have been expected to avoid* and (b) if he could have reasonably foreseen that harm of the type actually caused would result from such conduct The defendant is liable for negligence without fault (a) if the harm was caused by an innocently negligent (quasi negligent) activity *i.e* an activity initially negligent but legalised because of its social value (certain activities such as the operation of railroads or automobiles being quasi negligent in that sense as matter of law) and (b) if the harm was of a kind which could have been calculated (and therefore insured against) as typical for the particular enterprise

When damage is caused by a defendant he is either insured or he is not If he is then he must fail because that means he calculated the risk as typical If he is not then the dispute will be whether he ought to have been if he loses on that issue the plaintiff will be awarded damages but will probably be unable to recover them Or indeed the dispute may be whether the defendant is covered by insurance against

the particular happening or not That will involve a construction of his contract with the underwriters If he loses on that issue and it is found he is not covered then the plaintiff will probably not succeed the harm was not covered because it was not calculated If it had been it would have been covered In that issue the defendant and the underwriters have the same interest *i e* to demonstrate that there is no cover while the plaintiff who will find it hard to qualify a right or title to intervene in the dispute will be maintaining that the defendant *is* covered I see very great difficulties in attempting to run liability for negligence and indemnification by insurance in double harness I have asked you to consider the abrogation of civil rights in this matter it is not that a man should be found liable in accordance with his duty to foresee his duty or interest to insure against the consequences of his acts or omissions but that an effective insurance machine should be set up and maintained for the cover of the potential victim We would relieve the operator of the trouble of deciding on his insurances except in a question of his own commercial risks We would see to it that his victims were covered and render to him an account for a proportion of the premium On the other hand the author clearly recognises what seems entirely acceptable that one is on a much sounder footing if one deals with the problem as a business man would by leaving each several risk to be covered by the appropriate insurance rather than if one tries to fit the exigencies of a modern industrial and mechanised society to the procrustean bed of the common law doctrine of no liability without fault

Of course these tentative proposals of mine leave many questions unanswered Somewhere into any scheme for the

relief of accidental damage on an indemnity basis there would have to be fitted the socially comparable situation of the sick and the naturally bereaved I freely admit that my rough ideas which are inspired far more by an obvious and long standing break up of accepted legal principles causing serious grievance and want than by any capacity of mine to sketch a viable administrative scheme are open to a score of objections One of them is that any system such as I have outlined is wide open to the malingerer The answer to that is I think twofold First the malingerer like the criminal is but a small proportion of the population[23] Secondly the absence of lump sum compensation would make it convenient and necessary to pay the periodical sums subject to regular and strict medical examination Anyway if a few lead swingers slip through the net we may comfort ourselves by the thought that the cost of maintaining them will be less than that of negotiating disputed claims Also the reproaches of Mrs Brown and her children whose sad story I began by relating will have been silenced

[23] See Dawson *Social Insurance in Germany*

Part II

THE CRIMINAL LAW

III

FREEDOM AND ORDER

MY dear said the eldest Miss Prettyman to poor Grace Crawley In England where the laws are good no gentle man is ever made out to be guilty when he is innocent and your papa of course is innocent Therefore you should not trouble yourself It will break papa s heart Grace had said and she did trouble herself [1]

We may reasonably acquit Trollope of an intentional sarcasm He is not asking us to contrast the position of the gentleman in the dock with the prospects of one of the lower orders although such a sarcasm is not one from which he would necessarily have shrunk Miss Prettyman is pronouncing a panegyric upon the laws of England and inferentially upon the English way of life She was largely justified in so doing There are some things she says that cannot happen in England whatever may go on in other countries as to which I know and prefer to know nothing Such an attitude is of course rather irritating to the Scots although I fancy that in other parts of the world it is more likely to excite laughter If Miss Prettyman who was a very sensible and charitable woman had been asked whether she was prepared to extend her encomium to Scot land she would first have asked what the arrangements were north of the Border and would then have accepted them if

[1] *The Last Chronicle of Barset* Chap 5

and only inasmuch as they coincided with what she under stood went on at the Barchester Assizes This I think is as far as she would have been prepared to pursue her comparative researches I do not rate highly the chances of anyone who tried to get her to take an open minded view of the procedure in other types of jurisdiction for the pursuit and punishment of the criminal and the prevention of crime especially if that had involved considering a system typical of the continent of Europe After all she was speaking at a date not much further removed from the death of Napoleon than we are now from the Russian Revolution about which event many sensible and charitable old ladies hold strong views to this day

Nevertheless I propose to ask for a reconsideration of some of the assumptions which lie beneath that procedure which is in principle common to England the U S A the Commonwealth and in a slightly lesser degree Scotland This will involve looking at what face other systems present to crime—one of the few attributes common to all men and women wherever they are to be found regardless of race colour climate religious beliefs or political persuasions so far as I know peculiar to human among all living creatures an inevitable consequence of an essential part of the human make up everywhere detested yet everywhere increasing and leading in sum if not in detail to nothing but misery It is not likely that if crime is a manifestation of such univer sality the means of dealing with it can safely be studied under a geographical limitation

The wider study I propose is not really an academic exercise it has extremely practical applications Two

indispensable social concepts seem at first sight to be in competition here—freedom and order Societies go through phases in which first one then the other of these concepts becomes temporarily the master [2] It is probably inevitable that this should be so each is supported in the waning as in the waxing phase by a powerful section of public opinion and the problem is to achieve a just and equal balance Man won his liberty under the law after a struggle lasting the whole life time of humanity and it might have appeared about the year 1929 as though for the greater part of the world the libertarian phase would soon set in for good How wrong was that estimate was seen almost overnight The horrors of the concentration camps were primarily ascribable to human cruelty but behind them lay the twisted legal philosophy of the *Sondergerichte* (the special courts) and the *gesundes Volksempfinden* (the healthy sentiment of the people) as opposed to the constitutional courts and the general criminal code The requirements of a corrupt demand for order were incompatible with free institutions Today, by contrast you will hear on every hand complaints of a rising tide of crime especially those of violence and lust together with clamourings for sterner measures by way of remedy This is understandable but it is vital to acknowledge that that remedy must be of a kind which can legitimately be used by a free people If the law is less effective than it ought to be the unacceptable answer is that

[2] "Un système de procédure pénale pour être satisfaisant doit se montrer à la fois efficace efficient et libéral Il n en est pas moins vrai que cet équilibre idéal paraît difficile à réaliser et que les institutions pénales d un pays comme la France ont oscillé au cours de son histoire sous l'influence d une tendance libérale et d une tendance autoritaire dominant tout a tour" Professor Robert Vouin. See Coutts *The Accused* Chap 15

our humane standards be relaxed and the constitutional safeguards of the individual overthrown Let us first look at the system of law itself whether it is the fairest and most effective that can be devised and in answering that question we shall find ourselves going for advice to the experience of neighbouring jurisdictions

The Presumption of Innocence

The little difference of opinion between Miss Prettyman and Grace Crawley contains a reminder of something that the lawyer is liable to overlook Miss Prettyman was emphasising that an innocent man need never fear conviction Miss Crawley that he may leave the court acquitted but irretrievably ruined—with a broken heart she called it It can be put as strongly as this—that almost every verdict of acquittal manifests a miscarriage of justice Either a guilty man has escaped and the machinery of crime prevention has in that instance broken down or an innocent man has been wrongly arraigned to his grievous and undeserved injury It is possible to figure a case where an accused has only himself to thank for his predicament for example by making a false confession which he afterwards retracts but this case must be so rare as to be negligible

The reason why the acquitted man suffers grievous injury is also illuminating it exposes the fallacy of a notion much beloved of lawyers but correctly recognised by everyone else as nonsense Every man charged with crime it is said is presumed to be innocent of the offence alleged against him until he is shown beyond reasonable doubt to be guilty This does not make sense to the layman although he has been taught incidentally erroneously to rejoice in the

fact that this remarkable bulwark of individual freedom is denied to the citizens of less fortunate countries such as France That the burden of proof should be on the prosecution is one thing but that does not explain what a man who is presumed to be innocent is doing in the dock Once the *corpus delicti*[3] has been proved then the layman may say since everyone who is *not* in the dock must even more strongly be presumed to be innocent we have the remarkable concept of a crime committed along with a presumption that no one committed it or to put the matter a little less fallaciously along with a presumption of innocence available to anyone in the world who may be charged with committing that crime The public accordingly takes the view that so far from there being a presumption of innocence, the man in the dock has been put there because he is believed to be guilty and if the public is not right then the public ought to be right To say that a man who is believed to be guilty is presumed to be innocent is a sophistry To put on trial a man who is not believed to be guilty is an outrage[4]

If this be so several crucial questions demand an answer First upon whose belief in the guilt of the accused is the action of placing him before a court to be taken that is to say who is to prosecute? Secondly what are the steps which ought to be taken in order to gain the information which will justify action on that belief that is to say what

[3] The fact that the crime has been committed

[4] It could be argued that in the Law of Scotland there is no room for the presumption of innocence since it is irreconcilable with our curious verdict of not proven recently given a certificate of good character in *McNichol* v *H M Advocate* 1964 J C 25 The presumption must either be displaced by the verdict or not displaced by the verdict If it is not the accused remains innocent an innocent man is entitled to a verdict of not guilty See Willock *The Jury in Scotland* Stair Society Vol 23 p 222

pre trial procedure will have the effect of bringing the guilty and only the guilty to trial?[5] Thirdly what are the proper methods to be employed at the point where the decision has once and for all to be made whether the accused committed the crime with which he is charged that is what kind of trial will best ascertain the truth? And over and above all these questions are certain grand requirements which are of the essence of civil liberties and the Rule of Law No citizen may be molested in any way except as is allowed by law If the state take action against him he must even at the expense of handicapping the state in its proper function of the suppression and punishment of crime be afforded the most ample opportunity and assistance in meeting the charges against him There are no exigencies of law and order which take precedence over the duty of ensuring that no innocent man be convicted of crime

THE PROSECUTOR

I propose to begin answering the first question by taking a brief look at the English law as to the prosecution of offences and this I do because so far as I can see it exhibits some features to which it is not easy to find a parallel in other systems I also believe that these unique features go some way to explain even if only historically some of the characteristics of England s subsequent criminal procedure which have puzzled some of her neighbours The law of England has been stated as follows 'Any citizen can as a

[5] The task of criminal proceedings is that not a single innocent person shall be criminally *prosecuted* or convicted Code of Criminal Procedure of U S S R Art 2 *Bulletin of International Commission of Jurists* No 26 p 40

general rule and in the absence of some provision to the contrary, bring a criminal prosecution whether or not he has suffered any special harm over and above other members of the public As a member of the public he has an interest in the enforcement of the criminal law O steals P s watch P may prosecute him—so may Q R S T or any other citizen In practice, of course the vast majority of prosecutions are carried on by police or other public officers who have no personal interest in the outcome [6] The public officers include the nearest approach I can find in England to a public prosecutor, the Director of Public Prosecutions He institutes and carries on proceedings in the case of any offence punishable with death in certain cases referred by government departments and in cases which appear to him to require his intervention Regulations provide for chief officers of police reporting to the Director of Public Prosecutions cases of certain classes and the chief officer of police is always entitled to ask for the advice or assistance of the Director It does not appear from any regulations which had been made up to January 1966 that it is now incumbent on the police to report murder cases these being no longer capital

It seems therefore, that in England the public prosecutor is involved in few cases important though these may be, in comparison with the huge majority in which the prosecutor is a police officer. The police officer is nominally prosecuting as a private individual—being the Q R S or T referred to above—although his uniform may tend to disguise this To take the commonest form of crime motoring offences I suppose there is nothing to prevent the Englishman

[6] Smith & Hogan *Criminal Law* (1965) p 15

who observes a breach of the Road Traffic Act from prosecuting the alleged offender in a criminal court (whether or not he has begun by reporting the affair to the police and they have declined to take action themselves) although he would find some formidable obstacles in his way He is in theory doing no more and no less than the police constable who not only acts as prosecutor but also gives evidence before the magistrate as to the commission of an offence by which he himself personally has been prejudiced in no way at all but which he as a member of the public having an interest in the criminal law is entitled to bring to the notice of a court of justice so that the law may be vindicated But however that may be our first question was upon whose belief in the guilt of the accused does his being brought before a court depend? The answer is in England for all but a small minority of serious crimes the police

Let us now examine a widely contrasting system of criminal procedure In Scotland subject to some exceptions unimportant in principle there is no private prosecution The prosecution of crime is in the hands of a Minister of the Crown Her Majesty s Advocate commonly called the Lord Advocate He and the Solicitor General are the Law Officers of the Crown His office has a certain affinity with that of the Attorney General but in relation to criminal matters his responsibility is much wider Under him are the Crown Counsel five in number who form his staff in Edinburgh and conduct prosecutions in the High Court where counsel have exclusive right of audience In each county in Scotland there is a sheriff court staffed by full time professional judges the sheriffs I do not have to elaborate

the details of the office and the jurisdiction[1] It may be enough to say that all criminal cases of any consequence come before the sheriff—sometimes *en route* to the High Court —and that he exercises by far the widest criminal jurisdiction in the country Some criminal jurisdiction is enjoyed by the burgh magistrates and county justices but it is of an insignificant quality For the purposes of this part of my lecture the important thing is that to each sheriff court is attached a public prosecutor the procurator fiscal and he exercises his office as local representative of the Lord Advocate In cases which are tried in the sheriff court he conducts the prosecution himself or by his deputies in cases from his district which have to go to the High Court he takes instructions from and prepares the cases for the Crown Counsel who actually conduct them

I said that there were some exceptions to the rule of public prosecution in Scotland If you trespass on the railway line you will face a prosecution conducted by a solicitor instructed by the British Transport Board under powers as old as the statutes incorporating the old railway companies If you wilfully take unclean or unseasonable salmon or are found in possession of salmon in the close season you will be prosecuted at the instance of The Wardens and Commonalty of the Mistery of the Fishmongers of the City of London But if you commit the commoner kind of offence from the most serious down to most of the contraventions of the Road Traffic Act you will be prosecuted at the instance of either Her Majesty s Advocate or the local procurator fiscal representing him Even if the offence be of the trifling kind which is appropriated to magistrates

[1] See Coutts *The Accused* Chap 5

and justices of the peace the case against you will be conducted by an official solicitor appointed by the magistrates or justices as prosecutor Whatever happens whatever you have done and wherever you are tried you will never be prosecuted either by or on behalf of the police

Another exception of some constitutional but less practical importance is this The refusal of the Lord Advocate to institute or authorise a prosecution is not an absolute bar to proceedings being taken There is an almost obsolete, but still competent, form of private prosecution not by indictment but by Criminal Letters which may be instituted at the instance of a private citizen subject to the Lord Advocate s concurrence Even, however if the Lord Advocate should withhold his concurrence, the High Court may order the trial to proceed without it In 1909 a commercial company claimed that it had been defrauded by a coal merchant The Crown steadfastly and from what at the time many people thought were unworthy motives refused either to prosecute or to concur in a prosecution. The company presented to the High Court a Bill for Criminal Letters The court declined to order the Lord Advocate's concurrence, but authorised the trial to proceed without it and a conviction followed [8] In 1961 a Glasgow chartered accountant formed the view that a book called *Lady Chatterley s Lover* was obscene and that the distribution of copies was a common law offence The Lord Advocate after giving the matter careful thought decided that a prosecution ought not to be brought Thereafter the complainer relying on the authority of the case I have just described presented a Bill to the High Court The court

[8] *J & P Coats Ltd* v *Brown*, 1909 S C (J) 29

criminal judge and in that capacity not only determined the punishment to be inflicted on the criminal but condemned him in the damage claimed by the party injured in which last he had a cumulative jurisdiction with the Court of Session'
An early attempt to maintain a kind of converse plea that the Lord Advocate could not prosecute a homicide without the concurrence of the deceased s relatives was met by the successful answer Seeing the Prince wantis ane subject be the fact committit the Kingis Advocat has verie guid interess to perseu nor did any better success attend an attempt to avoid a Crown prosecution by producing a receipt for a sum of damages paid by an alleged murderer [12]

By the French Code of Criminal Procedure [13] it is provided that prosecutions for the imposition of punishments shall be initiated and conducted by the magistrates and officials in whom that power is confided by law Public prosecution is the rule in France, as in Scotland Neverthe less under the conditions prescribed by the Code such action may also be initiated by an injured party who has personally suffered the harm directly caused by the offence

A civil action may be pursued at the same time and before the same court as the prosecution It may include all heads of damages material as well as bodily or moral which flow from the acts which are the object of the prosecution Unless however the law expressly provides for the contrary renunciation of civil action does not terminate or suspend the prosecution The civil party to a criminal action has his place in the procedural rules throughout the investigation and trial so provision is made (Article 114) for his being assisted,

[12] Hume ii 133
[13] Professor Kock s translation

by counsel from the outset Thus the shape of a French trial in which there is a civil party will be utterly different from any English equivalent and perhaps nearer to the now obsolete Scottish System

In Germany, Gradually the idea took root that the prosecution of criminals was a matter for the state and finally this conviction was embodied in sections 151 and 152 of the *Strafprozessordnung* [1879] which provide that criminal proceedings cannot be opened until a charge has been filed, and that it is the duty of the prosecutor to file such public charge This gives the prosecution a monopoly He is however bound to initiate and conduct an investigation into any complaint and where an offence appears to have been committed to bring a charge [14] As in France the Code provides that in certain cases the person injured by a crime may take the place of the public prosecutor in a *PrivatKlage*, a private charge or may act along with him in a *NebenKlage* an accessory charge This applies to such offences as libel personal injury or damage to property [15]

In the United States the general rule is the same In America generally speaking private prosecutions are not permitted The criminal trial is conducted by a state paid professional [16] We are therefore entitled to conclude that a system which permits prosecution by anyone including the private citizen on the ground that he has an interest in the enforcement of the criminal law or that he is moved by the spectacle of a criminal act to what Hume called ordinary indignation is at least unusual And it is not I think

[14] Manual of German Law (H.M.S O) Vol II p 140
[15] Arts 374 395
[16] Poulsen & Kadish *Criminal Law and its Processes* p 917

satisfactory to equiparate the police to the public prosecutor on the ground that the police are to repeat the phrase from Smith and Hogan which I quoted earlier police officers who have no interest in the outcome The public will never believe and they would be wrong to believe, that the police *have no interest in the outcome of the cases which come* into court as a result of their investigations To say that is not at all to question the integrity of the police as police It is merely to state the obvious those who have conducted *the inquiries whose reputations will to some extent depend* on their bringing some person to book for every crime reported to them and who will almost certainly have to give evidence in support of their conclusions cannot on this side of the *Kingdom of Heaven be expected to preserve that* calm and impartial indifference to the decision of the court which should characterise the professional advocate responsible for conducting a prosecutor's case In many summary cases in England it seems that the person conducting the presentation of the case before the magistrate may find himself also giving evidence of fact in Scotland at any rate such a procedure is prohibited [17]

When it comes to the question of actual advocacy in the cause of a contested criminal suit there is a criticism which has been heard against the prosecution being in the hands of a salaried official as is the case in all the countries I have mentioned except England It is said that there are advantages to be derived from having counsel instructed specially to prosecute a particular case because in say the immediately preceding and immediately succeeding case in the same list he may have been instructed for the defence

[17] *Graham* v *McLennan* 1911 S C (J) 16

I can see the *a priori* case here but I do not have the experience to evaluate it I would certainly agree that it would greatly improve the professional ethics of Mr Perry Mason if he had occasionally to act as District Attorney

The question we are looking at at the moment who can bring an accused before the court needs a little clarification in the light of what has been said Thus although as I have said the police in England may be in nearly all cases the prosecutors that does not mean that they have power of their own authority to bring a man before a court other than a court of summary jurisdiction We shall be looking next at the procedure for getting someone tried by jury So in Scotland if a man is arrested by the police one evening and charged with a serious crime he will make a formal appearance in court next morning although nominally at the instance of the public prosecutor yet in practice necessarily on the initiative of the police Substantially however and subject to the exceptions we have noticed it can be reasonably said that in England a prosecution may be initiated by anyone in Scotland by an official public prosecutor, in France and Germany by an official public prosecutor with whom may be associated a directly injured private party

The Committal for Trial

At the beginning of this lecture I suggested that Grace Crawley in emphasising the damage which was being done to her innocent father a clergyman charged with stealing a cheque by the mere fact of his arraignment whether or not he was convicted was on good ground One of the inevitable consequences of that is that there has to be some machinery for preventing innocent people from being put on trial and

Now we must beware of taking sledge hammers to crack nuts No one is going to suggest that if a man plead not guilty to a charge of driving a vehicle without due care and attention a judicial inquiry is to be mounted for the purpose of deciding whether the evidence against him warrants his being put on trial Most jurisdictions would permit the prosecutor to lay his proof directly before the magistrate after such adjournment as might be necessary for the assembly of the witnesses on either side. It is one of the satisfactory features of prosecutions being exclusively in the hands of a public official that it ought to be possible to trust him to take for himself the responsibility of such a step He has after all no conceivable interest to present other than a genuine case adequately supported by evidence Furthermore in Scotland at any rate the procurator fiscal is answerable on complaint being made against him, to the Lord Advocate and the Lord Advocate in his turn is answerable like any other minister to Parliament This is the ultimate sanction if sanction be required

It may be however that the matter is not so clear where as in England the accused may have been and probably has been brought before the magistrate by a private prosecutor In theory at least it could be intolerable that a man might be actually put on trial albeit for a perhaps not very serious offence upon the malicious complaint of a neighbour Of course as we have seen most of the private prosecutors are police officers I do not want to repeat the substance of what I have already said but just as there is a good deal against police conducting cases so there may be a legitimate objection to the decision to bring a case being in police hands It would not be necessary in order to substantiate

this objection, to point to instances which must be rare in which the police power had definitely been abused and injustice had flowed from that abuse It would be enough to say that the system itself does not engender confidence so that a single wrongful exercise of this particular power although it might have had origin in a mere error of judgment could have very unfortunate consequences upon the public image of the prosecutor If and only if a system is right in principle, an occasional breakdown will be accepted as inevitable this of course is the force behind the doctrine that justice must not only be done but be "manifestly and undoubtedly seen to be done" We may observe with complacency the mistakes which are made by an authority subject ultimately to parliamentary challenge and regard them as exceptional lapses caused by ordinary human frailty while we readily suppose error if it be committed by an arbitrary authority to be the rule rather than the exception and we may invest it with more sinister characteristics

With the observation accordingly that the summary class of case is the common class of case requiring for that reason to be handled with a care and integrity which the subject matter might have been thought hardly to warrant I will turn to the consideration of the steps which are taken to ensure that no man be put on trial for a serious crime unless there be prima facie evidence tending to show that he is guilty we shall see that many jurisdictions insist that the making of an assessment in this sense is properly the function of a judge

In beginning with England I would wish to emphasise what I made clear at the outset namely that I am not a qualified English lawyer and that I am not attempting to give

a textbook description of English criminal procedure I am only looking at some features of what is a problem common to all civilised states that is the handling by the tribunals lawfully constituted for the purpose of breaches of criminal law and this I do for the purpose of seeing how various states achieve a solution I propose therefore to ignore such topics as informations *ex officio* presentments by coroner s juries (although broad minded people might be found to describe such verdicts as judicial decisions) and the historical position of grand juries (although these still have a vestigial importance in some states of the U S A) It may be that historically the grand jury is one of the institutions which was explicable by the existence of right of private prosecution I will make bold to say that in England for present purposes all persons who appear before juries for criminal trial have been committed by justices or magistrates who have satisfied themselves judicially after hearing evidence that the accused has a prima facie case to answer and I propose to look at this procedure for the purpose of comparing it with preliminary investigations having the same object carried on in different parts of the world The first aspect I am going to deal with is whether the proceedings before the committing judge are in public or in private This will inevitably raise the whole question of pre trial publicity

PUBLICITY OF COMMITTAL PROCEEDINGS

The rule in England in common with most other countries is that criminal trials take place in public There are some obviously exceptional cases such as those concerning the security of the nation many countries also pay attention to

the interests of decency or the protection of witnesses from unnecessary and cruel embarrassment, but with this we need not trouble But as regards committal proceedings the law now is Examining justices shall not be obliged to sit in open court'—Magistrates' Courts Act 1952 s. 4 (2) We ought to be entitled to suppose that this was the rule before the Act was passed since the Act appears from its preamble to be a consolidating statute that is to say to be a mere compendium of previous enactments upon the same topic It is far from clear that we would be right to do so According to the Tucker Report [18] the power of the justices to exclude the public was confirmed by the Indictable Offences Act 1848, s 19 the opinion however seems to have been widely held that the power was taken away by section 20 of the Summary Jurisdiction Act 1879 as subsequently interpreted. However that may be while the law is now as stated in the 1952 Act the Report contains some strongly worded judicial opinions by Mr Justice Park [19] in 1823 and Lord Chief Justice Ellenborough in 1811 to the effect that publicity ought not to be given to committal proceedings Indeed at one time there were cases "where a criminal information for libel was successfully laid against the printers or publishers of reports of committal proceedings. Today when the court is open to the public it is also open to the press, who are at liberty to publish a fair and accurate report of what took place at the hearing If the justices so decide they may exclude both press and public They do so only very rarely

[18] 1958 Cmnd 479

[19] The learned judge was against even the accused being present or seeing the depositions because then he would know everything that was to be produced in evidence against him—an advantage which it was never intended should be extended towards him We have happily moved a long way from that position

I presume that if in such a case a newspaper were to publish the evidence adduced proceedings could be taken in the High Court for contempt of court even though the case was still before the committing magistrates [20] Of the proceedings themselves it is only necessary to say that they may consist of an opening speech by the prosecutor followed by the examination and cross-examination of his witnesses The accused is asked if he wants to make a statement, whether he wants to give sworn evidence, and whether he wants to call evidence He or his advocate is entitled to address the court The court then decides on whether the evidence is such that the accused ought to be committed for trial, if that is decided affirmatively then in all but exceptional cases the court proceeds to consider bail

Thus in England the committal proceedings are usually in public and I will look by way of comparison at a country where they are always in public—the USA The procedure so far as I need to go into it is remarkably similar to the English—here again I propose to leave the grand jury out of consideration—and the nature and purpose of it is well described in a passage from Puttkammer *Criminal Law Enforcement* [0a] A person is arrested It may very well be that even the most superficial look at the facts would at once show that he could not possibly be guilty of the offence charged It is nothing more than obvious fairness to him then that he should be discharged at the earliest possible moment Accordingly promptly after an arrest the arrested person is entitled to be

[20] *R* v *Parker* [1903] 2 K B 432
U of Chi L Sch Papers 1341

brought before a magistrate so that the latter may decide whether if the state s evidence is true it presents a strong enough case to warrant holding our man for further proceed ings or whether the showing is so weak that there is no chance of conviction If the former is the case then it is the magistrate s duty to set the bail If the latter then the accused is entitled to his immediate liberty The effect of publicity on these proceedings is vividly brought out in an article on Problems of a Criminal Defense [21] The article takes the form of a dialogue "*Question*—Do you use the preliminary examination as a way to get information about the state s case? By refusing to waive the preliminary examination the defense counsel can force the prosecution to make proof of probable cause in advance of trial can it not? *Answer*—Theoretically yes actually not in most cases In certain cases it may be well to make the prosecu tion show what they have in a preliminary hearing and even to cross examine to a certain extent to pin a witness down In many other cases however the advantages are illusory while the disadvantages may be real Consider the following The publicity may be vastly increased by getting morbid details into the hands of the press So that it is harder to get a jury I suppose the concluding words may be trans lated—get an impartial jury who have not made up their minds before the trial begins

That this is true of England also admits of hardly any doubt The Tucker Report cites the case of Dr. John Bodkin Adams acquitted in 1957 of murdering one of his patients At the committal proceedings evidence which was not given at the trial was led about the deaths of two other

[21] Steinberg & Poulsen (1961) 7 Prac Law 25 30 quoted in Poulsen & Kadish *op cit*

patients At the trial the presiding judge had to go out of his way to warn the jurors to pay no attention to evidence which though not given in court they were almost certain to have read in the newspapers In 1965 in an island off the west coast of Scotland I heard two sensible and fairminded citizens potentially admirable jurymen talking about a sensational English murder case in such a way as to show quite clearly that they having read the committal proceedings in a newspaper had made up their minds on the guilt of the accused as yet untried In recognition of the likelihood of prejudice the *venue* had been changed from one assize town to another it would have done the accused no good as it seems even had the trial been held in an alien jurisdiction 300 miles distant from the court of committal Injustice may also have been done when the magistrate after a public hearing refuses to commit for trial This means that the public have had the opportunity of hearing evidence accusatory of an innocent man whereas the judge has found that there was not even a prima facie case for him to answer Again it is possible that the insistence on public committal proceedings may have had some connection with the system of private prosecution

In Scotland the whole preliminary proceedings up to the opening of the trial itself take place in private What happens is this A crime is reported by the police to the procurator fiscal it is most likely in the case of a serious crime that the police will themselves have taken an accused person into custody under their general powers of arrest which are roughly similar to the corresponding powers in England In such a case the prosecutor will at once do what in other cases he might have done before the arrest he

will apply to the sheriff for a warrant This warrant asks substantially for powers to take four steps (1) to arrest the accused and bring him before the sheriff for examination, (2) to search his person and premises (3) to cite witnesses so that the prosecutor may examine them and (4) after examination to commit the accused in custody or on bail for further procedure to take place The first striking feature of this procedure is that the accused at the earliest possible moment can be subjected to judicial examination and this similarity with the continental inquisitorial system I shall have occasion to notice a little later The next purpose of the warrant which is of present importance is that the prosecutor seeks power at his own hand to examine the witnesses and to take a statement from them which he terms a precognition The statements may be but commonly are not taken on oath It is upon these statements taken by him in private that the prosecutor asks the sheriff to commit the accused for trial A third feature is that until lately the committal order proceeded on the narrative that the sheriff had examined the precognition For some time that statement had been erroneous and it has been deleted from the form This appears to me to be a serious defect in our Scottish procedure inasmuch as committal without inquiry on an *ex parte* motion cannot seriously be regarded as a judicial decision and indeed partakes more of the nature of an administrative *lettre de cachet* No public complaints have arisen from this and I am willing to suppose that there have been no abuses but the procedure is formally objectionable and the older discipline seems preferable Nevertheless the principle is sound enough that of investigation by an impartial official and the presentation by him of the fruits of his inquiries to

a judicial authority in order that the latter may be satisfied upon them before he sends the accused for public trial

It is interesting that there should be available for study within the British Isles a system which though now altered —perhaps for the worse—probably through close contact with a more powerful neighbour shows quite clearly that it has affinities with the administrative side of the criminal law as it flourishes to this day in continental countries The most interesting contrast here is not between England and Scotland but between Scotland and the United States Each of these countries operates a system derived in comparatively recent times from a parent source The United States look to the common law of England for the principles which they as a sovereign state have modified to suit their proper exigencies The viability of those principles in a foreign land which has twice been at war with the country of their origin and which has for more than 100 years kept open house to immig rants from European states where other and quite different systems flourished must be a powerful tribute to their inherent virtues Scotland in turn looks to the traditions of the civil law Scotland however is not a sovereign state having no independent legislature and her old principles are therefore vulnerable to adulteration by Parliament steeped in the notions of English common law That so much of the tradition has remained may be accounted for by the fact that in criminal matters unlike civil there is no appeal from the supreme Scottish court to the House of Lords on the other hand it would be absurd to expect that a neighbouring system with the strong virtues the Americans appreciate should not have had its influence and indeed an influence for good It will accordingly be worth remembering the

outlines of the Scottish system as we take a quick look at the French pre trial procedure treating it as typical of a whole legal civilisation

FRENCH PROCEDURE

A detailed account of French procedure has been published by Professor Anton of Glasgow University who is equipped from personal experience as an expert on the topic in an article entitled *L instruction criminelle* [2] A general view of the system is given as follows *L instruction criminelle* has always been one of the characteristic features of French criminal procedure In the past it would perhaps have sufficed to describe it as a method of assembling the elements of proof against an accused person to permit of the court being adequately informed (*instruit*) of these before the public trial The emphasis was upon the investigation of the crime in the general interests of society that the guilty should not go unpunished Today such a description would be inadequate since the process finds its justification also in the safeguards it offers to the accused The purely investigatory functions of the *juge d instruction* could be taken over by the police but the police are not quite free from the suspicion of being too anxious to secure convictions and it is felt that investigation by a person of judicial status may shield innocent persons from the risk of being exposed to over zealous police interrogation The device of *instruction* also ensures that an accused is not arraigned upon a serious charge in open court with all the attendant publicity unless and until a magistrate after carefully and impartially investigating the facts is prepared in effect to say that there is a

[2] (1960) *American Journal of Comparative Law* Vol 9 p 441

cause him to be cautioned before putting to him any ques tions or further questions relating to that offence in the following terms You are not obliged to say anything unless you wish to do so but what you say may be put in writing and given in evidence [23] In Scotland the provision is similar but stricter When a person is under suspicion of a crime it is not proper to put questions and receive answers except before a magistrate [24] A criminal officer is not entitled to examine a person suspected of a crime in order to obtain confessions or admissions from the criminal [25] Once a man has been charged and is in the hands of the police—and even more clearly perhaps when he has only been appre hended—it is recognised as incompetent for the police to attempt to elicit evidence from him [26]

Obviously in both countries the critical question is at what stage do the rights of the suspect to a caution or to the cessation of questioning emerge? The decision must lie in the hands of the interrogating officer since it depends subjectively upon his state of mind as to the weight of the evidence against the questioned In France exactly the same difficulty presents itself Although nominally the investigation of crime is for the *juge d'instruction* yet it is necessary in order that he may overtake his work for him to delegate some part of his duties not including the examination of an accused per son to the police and others under a *commission rogatoire* In every case there must come a point at which one of the witnesses who is being examined begins to take on the appar ent character of an accused At this point he must be

[23] Judges Rules and Administrative Directions to the Police Home Office Circular No 31/1964

[24] *Hay* 1858 3 Irv 181 at 184

[25] *Hodgson* v *Macpherson* 1913 S C (J) 68 at 74

[26] *Morrison* v *Burrell* 1947 J C 47 *per* Lord Moncrieff at p 49

sustainable case against him But these are oversimplifications and in this matter the nuances are important and the context critical

Police Investigations

The resemblances to what we are accustomed to in the purposes behind the English and the Scottish systems are most striking as are also the contrasts For instance, it is interesting to see how in widely differing systems the same problem partly practical and partly dialectical arises This is yet another example of the familiar conflict between two opposed requirements both good and necessary in themselves It is necessary for the police when apprised of a crime to make wide spread inquiries rapidly thoroughly and without respect of person Otherwise they cannot do their work In the course of their investigations it is almost certain that they will find themselves questioning the person who is ultimately charged with committing the crime and this they must be allowed to do On the other hand it has always been recognised as no less important that the police do not interrogate a person they have decided to charge for the purpose of trying to elicit damaging admissions One good reason is that subsequently when it is sought to prove the admissions at the trial disputes break out as to what really passed at the interrogation and in any such dispute the accused lies under a heavy handicap Rules have accordingly been formulated by the English judges to the effect that as soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence he shall caution that person or

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at other people s law has gone A strict judicial control and more than that the opportunity of strict parliamentary con trol is the best answer to official delinquencies The third of the matters I said I was to deal with that is the procedure after committal has been authorised will involve looking at foreign solutions much more sharply different from our own than these adopted for the more preliminary stages I have just been dealing with We shall apply to them the same test that is whether they help us to find a system which ideally shall ensure us a high degree of crime prevention the protec tion of the innocent not only in their persons and property but also in their reputations and such vindication of criminal justice as shall command the confidence of the public

IV

THE SEARCH FOR TRUTH

THE scene is laid in a first class compartment of a railway train going from Edinburgh to Glasgow Two passengers are in conversation One is clearly a foreigner very civil and polite keenly interested in the institutions and customs of the country he is passing through but obviously not knowing very much about them The other turns out to be a junior member of the Scottish Bar on his way to practise his profession by acting as defending counsel at the Glasgow Circuit Until 1954 he would have been travelling entirely at his own expense and until 1964 with no expectation of receiving a fee because his client has no money One reason he has no money is that wages in prison where he has spent most of his life are very low At the time we are speaking about however reasonable fees to his solicitor and counsel are very properly provided by the state Advocates are not usually garrulous with strangers but this one is an exception and has been giving his chance acquaintance a brief sketch of the Scottish legal system complete with the usual allowance of humorous anecdotes about the judges As the exposition proceeds so does the demeanour of the foreign gentleman become more and more respectful until at last he interjects

Yours is an honourable profession and one deserving of the approbation of all good men assisting as you are in a matter of great importance to the individual and to the state in the process of ascertaining the truth   Good heavens

replies learned counsel you entirely misunderstand me My whole purpose in going to Glasgow at the public expense is to try to stop the truth coming out it would be fatal to my client

The Advocacy System

The polite foreigner s hasty revisal of the social value of the Bar is of course unjustified but one does after all require a rather special appreciation of our institutions before one can come to his help One would perhaps have to begin by mystifying him still further He will hear with incredulity which gradually gives way to indignation that an individual called the Leader of the Opposition is actually paid a substan tial salary by the state out of public funds for preventing if he can the machinery of government from functioning pro perly[1] You and I of course don t require an explanation for what is not to us a paradox One way of arriving at the truth of an accusation brought by A against B for the arbitrament of C is to let A and B lay before C their res pective proofs and submissions leaving C to make the best judgment he can exclusively upon the matter which has been selected by A and B for his reception The interested parties institute a debate before an impartial adjudicator each con fining himself to the aspects which are most likely to interest the adjudicator and persuade him to come down on the right side This is the principle which inspires British American and Commonwealth criminal procedure and there is nothing accordingly other than completely honourable in the conduct of a party s advocate who makes it as difficult as he can by obstruction non-co operation or concealment for the

[1] Ministers of the Crown Act 1937 as amended

opposing party to win his case always provided that he stick to the recognised rules of the game The honour of the advocate which we all so much admire is seen in that he *does* stick to those rules however strongly his client s interests may tempt him to depart from them or even to evade them in minor particulars which are not likely to lead to discovery It is not his duty to criticise these rules He may even perhaps not approve of them he is not called upon to do so He is called upon to obey them and he does

I have been brought up to venerate the traditions of the Bar The ethics of advocacy are perhaps of all professional codes at once the strictest and the best observed it is certain that they operate in the course of a hotly contested trial under a greater strain than do the rules of conduct of any other body So you will not imagine that I am belittling them or reflecting on their efficacy in any way I am looking a little deeper than that These professional ethics are a by product of a particular system If the system were different the code of conduct would have to be changed too just as surely as if the code were not honourably observed the system could not survive for a day Even now some strange exceptions which are not easy to fit into a reasoned apologetic have been admitted and there is also evidence of some waning of public confidence Perhaps the latter point might be better described as a more forcefully vocal expression of what must have been for long a criticism below the surface

If the truth is best disclosed by having the kind of party competition I have described why is it that in criminal trials it has long been accepted nay it is a rule of conduct that the prosecutor shall behave rather differently from the

defender? For the latter—to use a vulgar expression—no holds are barred so they be within the ethical code For the former many holds are barred He is said to be in some kind of responsible ministerial employment not expected to press every point he can lay his hands on against the accused but substantially to place the facts before the tribunal and temperately to submit that they speak for them selves It is something more than a difference of emphasis I have no doubt that it would be agreed by English and Scottish Bars alike that the rights and obligations of prose cuting counsel in pressing home his case differ in kind from the rights and privileges of defending counsel [2] Why should this be? In former times the answer may have been that the situation of our accused deprived even of counsel in England till 1838 and in Scotland if he were impecunious relegated to the experimental sciences of junior counsel for the poor was such that Christian charity must temper the storm of the prosecution case prepared and presented regardless of expense by Crown Counsel the procurator fiscal and the police That is an attractive theory but I would venture to ask whether assuming criminal legal aid as we now have it and assuming unlimited access by accused persons to the apparatus of criminal detection such as scientific and forensic medicine laboratories as we ought to have it and the accused put as regards facilities on precisely the same footing as the Crown would the rule then be abrogated? I think that it would not I am sure it is rooted in some deeper soil than a

[2] The duty of a prosecuting counsel or solicitor as I have always understood it is this if he knows of a credible witness who can speak to material facts which tend to show the prisoner to be innocent he must either call that witness himself or make his statement available to the defence *Per* Lord Denning M R in *Dallison* v *Caffery* [1964] 2 All E.R 610 618

mere utilitarianism I expect that in England at least there are still some vestiges of the sporting spirit to be taken account of and that no doubt quite incidentally it is an occasion for quiet satisfaction when the citizen whatever crimes he may have been on the best possible ground charged with receives an acquittal There will be some pressure to retain this easy going acquiescence in the little man defeating the establishment even a democratically elected establishment but I cannot say how long this will survive the growing feeling that the war against crime is being lost and that it is time something was done about it

I referred to the waning of public confidence as being something of long standing and so it is For me the last word has been spoken by C P Harvey Q C in his book *The Advocate s Devil* He points out that down the centuries the profession of the advocate has been suspected by the laity His willingness to take up the causes of those who he is privately and professionally convinced are in the wrong and his uncritical acceptance of standards of conduct which are austere but at the same time possibly anti social—these charges have been regularly and brilliantly refuted but still they continue to be brought just as if the refutation had been ineffectual Now if the ethos of the British advocate is an inevitable and indispensable concomitant of our system of criminal procedure and if the general public have never been able to understand that ethos or to adapt it to their own ideas of morality but if nevertheless they accept the advocate as an honourable and admirable public servant—as I believe they do—then it looks as if we must suspect the system itself as being unacceptable today And such a suspicion should clearly lead us to look for comparison and reflection at other

people s law not of course uncritically but still without prejudice W S Gilbert whose lyrics I personally tend to admire more for their technique than for their sentiments warned us about

The idiot who praises with enthusiastic tone
All centuries but this and every country but his own

Nothing could be more fatal than for me to take that attitude in looking at systems I but imperfectly understand and in comparing them with ours which have stood so strongly and for so long Nor will grave defects, mostly I think administrative in foreign procedures be difficult to discern On the other hand I fear we must reluctantly reject the robust attitude of Dr Johnson Boswell reports him as follows 'His unjust contempt for foreigners was indeed extreme One evening at old Slaughter s Coffee house when a number of them were talking loud about little matters he said Does this not confirm old Meynell s observation *For anything I can see foreigners are fools*?

SOCIETY AND THE INDIVIDUAL

Whenever any citizen of any country begins to look critically at his national system of criminal police jurisprudence and disposal he must inevitably find himself distracted by two opposing though not necessarily irreconcilable requirements First he demands of the law what the law exists to provide that is protection against law breakers Secondly he is not prepared to give *carte blanche* to his protectors so that they be authorised to supply a first-class article at an outrageous price He the citizen is a potential victim of the law breakers but it will not help him if he become a potential

victim instead of the protective machine Security without liberty is as unacceptable as liberty without security is falla cious It has been strongly put by a French scholar whom I have already quoted as follows Certainly there is no doubt that individual liberty is under continuous threat from lawlessness which can amount to anarchy fostered by an excessive weakening of the power of repression On the other hand it is equally true that a system of justice which does not guarantee the protection of individual liberty is always in danger insecure and contrary to the public interest A system of criminal procedure to be adequate must exhibit simultaneously effectiveness efficiency and humanity May I suggest that criminal procedure is wrongous unless it guarantees that the rights of the accused will be respected but that it is just as bad if it sacrifices the defence of society to an excessive desire to protect the liberty of the individual [3] I am not sure that I would go as far as this because Professor Vouin seems to regard the two attributes of criminal justice as being of equivalent priority I think most of us in accord ance with the dictates of our own historical traditions would insist on the ultimate liberty of the individual at all costs preferring anarchy to authoritarianism But all this need not prevent us from holding when we have completed an exam ination of our own system that the constitutional guaran tees have been overdone and that individual liberty and personal rights could still be kept in high regard simul taneously with the placing of modern weapons in the hands of those who on our behalf are fighting the war against crime

[3] Professor Robert Vouin *Interêt public et droits de la défense dans la procédure criminelle française* Birmingham 1964 See Coutts, *The Accused* Chap 15

THE CRIME WAR

There are at least three fronts upon which this war is fought and I am concerned with only one of them They all inter lock but they are all separate The prevention and detection of crime is the duty of the police but the first part of their objective is also that of those fighting on the third front in the prison service There the main objective also is crime prevention both in the individuals committed into care and also in those to whom the existence of a prison system is a standing deterrent With these two fronts I am not directly concerned In between them however is deployed the legal system which is intended subject to all the individual guaran tees I have emphasised to transmit those who have been detected committing crime and only those to the disposals branch for the appropriate treatment to be applied to them This link is vital You will sometimes hear it said that the best deterrent of crime is the certainty of detection—that if the police were 100 per cent efficient no sane man would be foolish enough to commit crimes But this is not so it is not the certainty of detection but the certainty of conviction which deters the criminal at all events the kind of criminal who is more or less indifferent to public opinion In the same way we need not trouble to discuss up-to date methods for the beneficial treatment of convicted persons except in relation to those persons who are presented for treatment, the smaller be that number in proportion to those detected the more futile becomes the whole science of penology This is what makes it imperative for us the lawyers to look anxiously at our own system lest by any faults in it we should be stulti fying the work of the other Arms of the Service And since

we also are public servants the public is entitled to attend the inquest

Juries at Work

The public do not attend this inquest in the purely passive role of spectators In the very first aspect I propose to examine the man in the street has not only a legitimate interest but also a personal responsibility

Suppose a person to have been selected for prosecution to have been charged and to have pleaded not guilty The following disturbing passage is taken from Dr Nigel Walker s *Crime and Punishment in Britain*[4] p 16 The accused s chances of acquittal vary according to the type of court before which he is tried In English courts with juries he is acquitted in rather more than a third of the cases in summary cases his chances are less than one in twenty five Since magistrates courts must try over 100 000 pleas of not guilty every year and must be rejecting over 90 000 of them it can be assumed that if the percentage of wrongly convicted persons were substantial the volume of protest would be formidable It is much more likely that juries in acquitting over a third of accused persons are operating with a larger factor of error For my part I would go further than that I would say that if anything like 35 per cent of those who were acquitted were other than guilty there would be a public outcry which would not be stilled at the gross outrage of so many innocent people having to stand their trial Later research by the Association of Chief Police Officers of England and Wales shows that the figure given

[4] Oxford 1965

by Dr Walker is not growing less and discloses an astonishing state of affairs The national average is 39 per cent which happens also to be the figure for the Metropolitan Police District Some of the more sensational returns (the total number tried by jury are given in brackets) come from the City of London (52) 56 per cent Kent (218) 58 per cent Dorset (63) 78 per cent, Coventry (32) 84 per cent Monmouthshire (23) 91 per cent Would it be too severe to say that in areas like these criminal justice is breaking down? [5]

In Scotland the figures are not easy to come by because of the confusing way in which our criminal statistics are at present compiled I am authoritatively informed, however that the equivalent figure may be taken at 20 per cent [6] This though better than England is bad enough The reasons for the discrepancy are not far to seek The first and possibly the least important is that in Scotland a jury may return a verdict by a majority so that even though there are fifteen jurymen on a Scottish jury a smaller number of votes for 'guilty' is required than in England and a large minority in favour of acquittal need not deflect the majority from their course It may seem strange at first sight that you can say the Crown has proved its case beyond reasonable doubt by a majority of eight to seven but the position is logically unassailable and I have heard no complaint about it although there is a case for amendment The second and to me convincing reason for the discrepancy is that in Scotland no accused person has the right to demand trial by jury The choice of *forum* is the prerogative of the prosecutor and is based partly on the nature of the crime but mainly on the

[5] *New Law Journal* 1966 Vol 116 p 923
[6] Ex rel Scottish Home and Health Department

prosecutor s view of what would constitute an adequate punishment If he decides that a suitable punishment would be a fine or a short term of imprisonment (up to three or in some cases six months) or if the offence is declared by statute to be triable only summarily the prosecutor will order a summary prosecution before a sheriff—I ignore for this pur pose the limited summary jurisdiction of the lay magistrates If he conclude that the offence merits a sentence of imprison ment of up to two years he may send the case for trial by the sheriff with a jury If a heavier sentence than that be demanded or if the case be one of a class so appropriated by the law the case must go to the High Court of Justiciary where the jurisdiction is unlimited and the trial is by jury So you will see that in Scotland there is none of this com fortable practice of persons charged with drunken driving demanding a jury trial in the sure and certain hope of over indulgent treatment from sympathetic fellow motorists pos sibly with similar propensities In Scotland such cases are tried by the sheriff unless there are aggravations such as death having been caused which might mean sending the case to a jury And that this type of case is most influential in swelling the percentages of acquittals receives confirmation from an authoritative sources In 1964 for the related offences of driving while unfit to drive through drink or drugs and being in charge of a vehicle while so unfit there were charged in the magistrates courts of England and Wales 9,541 persons After deducting the number committed for trial we find that 419 persons or say 5 per cent were acquitted Of those committed for trial and tried by jury 606 or 37 per cent were acquitted [7] We must beware of

[7] *Offences relating to Motor Vehicles 1965* H M S O

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OF THE PRESS

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of constitutional entitlement and that we ought never to allow from any view of public interest or public policy to be whittled down in any way I have already touched in these lectures on the necessity for ensuring the impartiality of juries and went so far as to suggest that even authorised judicial proceedings ought not to be made public if this essential safeguard might thereby be compromised In Britain and perhaps nowhere else we go a good deal further than that and it is quite instructive to look at what can happen in the United States in spite of the ancestry of their legal institutions 'England said Mr Justice Clark from whom the western world has largely taken its concept of individual liberty and of the dignity and worth of every man has bequeathed to us safeguards for their preservation the most priceless of which is that of trial by jury In essence the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial indifferent jurors The failure to accord an accused a fair hearing violates even the minimal standards of due process [8] Unfortunately these high principles have come into conflict with other equally elevated sentiments originating with the same testator and in some respects the former have been forced to yield The liberty of the press wrote Blackstone consists in laying no previous restraints upon publication In declaring the invalidity of an official censorship he was stating a principle which had become established in England by 1695 and in the colonies by 1725 The issue had thus been closed for decades by the time the First Amendment was adopted [9] The official censorship whose invalidity had been declared

[8] *Irvin* v *Dowd* 366 U.S 717
[9] Pritchett *The American Constitution* p 393

was of course directed against newspapers which criticised the Crown and the ministers it was fundamentally a political censorship and obnoxious to any true state of liberty But the First Amendment has now been interpreted as rendering unlawful restraints of a very different kind In *Near* v *Minnesota* [10] a majority of the Supreme Court declared un constitutional a statute which provided for the abating as a public nuisance of ' malicious scandalous and defamatory newspapers by injunction in the courts An even larger claim which has incurred scathing judicial censure but which cannot apparently be repudiated has been made for the freedom of the press in criminal matters The point in the case of *Irvine* v *Dowd* from which I have already quoted is made plain by the following extract from the judgment of Mr Justice Frankfurter More than one student of society has expressed the view that not the least significant test of a civilisation is its treatment of those charged with crime particularly with offences which arouse the passions of a community Not a Term passes without this Court being importuned to review convictions in which substan tial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often as in this case with the prosecutor s collaboration—exerting pressures upon potential jurors before trial and even during the course of trial thereby making it difficult if not impos sible to secure a jury capable of taking in free of preposses sions evidence submitted in open court Again and again such disregard of fundamental fairness is so flagrant that the Court is compelled as it was only a week ago to set aside a conviction in which prejudicial newspaper intrusion had

[10] (1931) 283 U S 697

poisoned the outcome This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system —freedom of the press properly conceived The Court has not yet decided that while convictions must be set aside and miscarriages of justices result because the minds of jurors or potential jurors were poisoned the poisoner is constitutionally protected in plying his trade

The most interesting feature of this situation is that we have here a conflict similar to the larger one between the public interest and individual liberty A country without a free press is a slave state—but what if the state be enslaved by the press? This could perhaps be said to be on its way when the Supreme Court judges acknowledge that the press are interfering with the constitutional guarantee of due process of law that the judges are forced into miscarriages by way of quashing convictions but that they are unable to avoid such interference because of another constitutional guarantee that of freedom of the press This must be said in justice to our own systems that for the protection of what Mr Justice Clark called the concept of individual liberty and of the dignity and worth of every man if newspaper editors and proprietors did in England or Scotland what their colleagues in Indiana did in *Irvin s* case they would find themselves in prison in short order enjoying the company of the prosecutor who had collaborated with them

The Limits of Investigation—Preliminary

When an accused person has been charged and it has been decided to institute and carry on proceedings against him obviously the first requirement is a careful and thorough

investigation into the facts for the two purposes as we noticed earlier first of being sure that an innocent man is not being unjustly accused and second of making certain that the tribunal of inquiry will have before it enough evidence to enable it to pronounce a finding of guilt On general principles where should that inquiry begin? Conditioned as we are by our age old rules of practice we shall probably say Well you interview the man whose house was broken into you look for the goods which have been stolen searching especially the accused s repositories you go round the suspected receivers and so on This has all to be done sometime it is true but are we not overlooking the obvious? We have already decided by arresting and charging him that the accused knows as much about this affair as anyone Why don t we begin by questioning *him*? You may remember that that was just what was provided for in the old Scots system the first warrant which the prosecutor asked for included power to apprehend the accused and bring him for examination You will also remember that after arrest interrogation by the police becomes unlawful I do not understand that to be so in England as appears from the Judges Rules (1964) III (*b*) But this judicial examination in fact never takes place The accused is not obliged to submit to examination and it is not permissible to refer in court at his trial to his refusal to do so

Suppose these rules were to be altered? The sequence of events after an arrest would then be something as follows At once a defending solicitor if necessary from a stand by panel would be obtained The accused would then be brought before the duty magistrate (I am supposing the arrest to have taken place in a large centre of population

and in the middle of the night) and interrogated This could quite properly be done by the police or prosecutor only a person who is acquainted with the subject matter can direct his questions to the relevant topics especially when a witness is reluctant or evasive The interrogation would be recorded verbatim preferably electrically The refusal to answer any question would be noted and could be founded on at the trial The accused s solicitor would have no right to take any part in the proceedings which are purely for the purpose of according to the prosecution the opportunity of ascertaining the facts He is there to see that proceedings are carried out in accordance with the rules If any unfair questioning took place this would be recorded with the rest of the evidence and it could if necessary be excluded by the judge at the trial There is no reason why such interrogations should not take place as often as the prosecutor desires them up to the time at least of the service of the indictment All would be subject to the same safeguards

THE LIMITS OF INVESTIGATION—IN COURT

I will take this matter of the interrogation of the accused a little further Supposing what can hardly be denied that in most cases the testimony of the accused is an indispensable part of the information required by the court for the purpose of arriving at the truth why should the accused be entitled to withhold that information? It may be that the time is ripe for a revolutionary change such as that which was made in 1898 when for the first time accused persons in Britain became competent witnesses even on their own behalf The grounds upon which that change in the law was opposed are instructive Apart from the rather archaic objection that the

new law would encourage perjury the main one was that it took away from a (guilty) accused the privilege of being able to say through his advocate Ah if only I had been allowed by law to give evidence the whole thing could have been satisfactorily explained and my innocence established Those who took that line were persisting in the notion not uncommon to this day that a criminal trial is a combination of ceremonial ritual and sporting event in which it is a pity to stop up all the loopholes because that spoils the fun We can see clearly that the reforming statute itself contains vestiges of this idea inasmuch as the prosecutor is forbidden to comment on the accused s absence from the witness box The judge can but if he does so he runs the risk of a rough passage in the Court of Criminal Appeal In America the practice is altogether forbidden for comment on the refusal to testify is a remnant of the inquisitorial system of criminal justice which the Fifth Amendment outlaws It is a penalty imposed by courts for exercising a constitutional privilege [11] But the inquisitorial process has been constantly reformed since the date of the outlawry This decision would not be accepted here

SELF INCRIMINATION

No doubt this reluctance to allow of an accused being questioned by the prosecution at his trial is a product of the idea that a man should not be called upon to incriminate himself It is not easy to see how an innocent man could incriminate himself by giving evidence in fact innocent men almost always do give evidence and are cross examined

[11] *Griffin* v *California* 380 U S 609

by the prosecutor The dislike of compulsory self incrimination is of course very strong in the United States this is developed in a most interesting way in relation to discovery in criminal causes by Professor Louisell in 53 *California Law Review* p 89 The American Law Institute s Model Code of Evidence rule 201 (1) is as follows Every person has a privilege not to be called as a witness and not to testify in any criminal action in which he is an accused The comment made by the Institute begins This is law everywhere Pausing there while the observation is no doubt universally true of the United States I may venture the rash speculation that it might be correct to change the comment to read This is law nowhere except in the U S A Great Britain and those countries whose laws derive from England However that speculation need not be indulged in in view of the next passage in the Comments It is entirely impracticable at this time if not unwise to attempt to abolish this privilege If we assume the continuance of trial by an impartial jury before a competent judge in public it is difficult to understand how an accused represented by competent counsel can be unfairly treated by being required to testify He may need protection against police and prosecutor but he can hardly need protection against judge and jury whose action is subject to review by an appellate court The commentators accordingly do no more than indicate helplessness in face of a logically indefensible rule which cannot be changed because public opinion would not tolerate change For my part I am not at all sure that public opinion would not tolerate it if it were demonstrated to them (a) that an alteration in the law so that an accused becomes a compellable witness for the prosecution could not possibly

prejudice an innocent person and (b) that it is expedient in the interest of the suppression of crime that the change be made Again we have to look at the conflict between public interest and individual liberty we do right to promote the former unless it can be shown that we are doing so at the expense of the latter We must fairly ask ourselves should the accused be entitled by law to conceal relevant evidence by refusing to testify his evidence being relevant should it not be both competent and compellable?

The Relevance of the Previous Record

The same question can be asked in a rather different form in relation to other evidence which is now incompetent but may well be relevant The most anxious care is taken to see that until after conviction the previous criminal record of an accused is concealed not only from the jury lest they be affected by it but also from the judge on the—rather insulting—view that his capacity for impartiality will be vitiated by his being in possession of the facts Now no one is going to maintain that a man s long record of house breaking demonstrates his guilt of the particular house breaking with which he is charged Of course it does not —such an attitude is just giving a dog a bad name and hanging him But this is not to say that his long record of housebreaking is irrelevant to the question of his present guilt The jury does not think it is irrelevant it is only the lawyers who do and conceal from the jury facts they would be very pleased to know about It is sometimes said that you must hide a man s record from the jury because a jury is incapable of appreciating that that record is no more than a piece of evidence but will be inclined to accept it as

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conclusive I doubt the truth of that but even if it were so you would only be saying that the jury as we know it is an incompetent kind of tribunal and would be opening up the present system to even wider suggestions for alteration There are however three considerations which seem to me to be very much against the validity of the present rule First there are in fact circumstances in which the accused s bad record *is* admissible in evidence for example, if he himself has attacked the character of a prosecution witness Not only does this rule lead to excessive refinements of judicial opinion [12] but it seems illogical to hold that if the accused take a certain line in his defence then as a kind of punish ment cogent evidence which would otherwise have been excluded will instead be admitted Secondly the accused s good character has always been admissible and juries have to be warned as to its limited weight just as they would have to be were evidence of bad character admitted Indeed there are some crimes such as the great company and commercial frauds which can only be committed by people of hitherto blameless reputation [13] Thirdly in Scotland at least a curious doctrine of corroboration cuts deeply into the rule If a man be charged with a series of offences which are sufficiently interrelated in time place and circum stances then the evidence of a single witness as to one of the series may be taken as corroborative of the evidence of a single witness to another It was put picturesquely by Lord Sands *If a man were accused of having on two* separate occasions obtained food and lodging without pay ment on the narrative that he was Mr George Bernard Shaw

[12] *e g R* v *Flynn* [1963] 1 Q B 729 *O Hara* v *H M Advocate* 1948 J C 90
[13] *Trial of the City of Glasgow Bank Directors* p 353

and of having on each occasion absconded in the morning with the family Bible then no reasonable man could resist the conclusion that identification of the accused as the man who committed the one offence was corroboration of his identification as the man who had committed the other [14] Observe that the man is only *charged* with the other had he been convicted in the recent past of a number of such idiosyncratic offences evidence to that effect although over whelming to the ordinary man would be absolutely excluded

The conventional objection to evidence of this kind is eloquently stated by Dr Glanville Williams in his *Proof of Guilt* [15] where he speaks of the exaggerated importance that a jury consisting of persons without legal experience may attach to this kind of evidence for they may argue This man is charged with crime and the police think he did it and he is clearly of criminal habits therefore he must be guilty That there is danger here and that careful direction by the judge if such evidence is to be admitted would be required all may agree But put the imaginary argument a little differently and more I venture to think as it would appeal to the ordinary juryman and see whether there is much objection to it This man is charged with crime because the public prosecutor after careful inquiry thinks he did it and a judge has decided that there is a prima facie case against him he is clearly of criminal habits and that matter while by no means conclusive is not irrelevant to the question of his guilt

Relevance is surely the ultimate test There is as I understand it a refinement of English law which is absent

[14] *Moorov* v *H.M Advocate* 1930 J C 68 at p 88
[15] 3rd ed p 214

from Scottish practice There are a number of cases[14] in which the English courts have held that evidence which is competent and relevant has to be excluded because of the extremely prejudicial effect it will have against the accused There is much to be said for the view that the duty of the prosecuting counsel is to lay before the court evidence which is prejudicial to the accused and the more prejudicial the better always provided that it is not inadmissible under any identifiable rule of law This is perfectly compatible with an equally important balancing duty upon the prosecutor that is to lay before the court or at all events to make available to the defence any circumstances which may seem to favour the defendant But he ought not to be obliged to suppress lawful relevant evidence because it is so damaging Such an obligation may perhaps be another example of the survival of sporting instincts

TWO SYSTEMS OF TRIAL

So far we have been discussing matters preliminary to or incidentally connected with criminal proceedings rather than examining the actual framework of a criminal trial Many of these matters are handled differently in the various countries we have looked at from what we are accustomed to in our own nevertheless that does not in itself mean that the systems as a whole are distinct It would be perfectly possible to adopt into for example the English organisation many if not all of the expedients which as we have noticed are now excluded from it without altering that organisation in kind I am now coming to the trial itself and in this field there is

[14] See *R* v *He*[illegible] [1966] 3 W.L.R. 3[illegible]4

scarcely any room for compromise between two completely opposed concepts As a matter of record these concepts have been respectively termed inquisitorial and accusatorial but I do not find these expressions particularly helpful With the second the English/U S A /Scottish system we are all familiar and I have already noticed how it is based on the presentation by advocates retained for the prosecution on one hand and for the defence on the other of such evidence as in their judgment is relevant to the only question before the court namely did A do X? This they do in such a way as they calculate will be most likely to persuade the tribunal be it judge or jury that their side is right And the contest is presided over and controlled by an impartial judge who takes no part in the proceedings other than supervisory until the time comes when he has either to declare his decision or to give instruction to the jury who have to do so His total aloofness in Scotland is emphasised by the fact that when he takes his seat on the Bench to try a criminal case with a jury his acquaintance with the matter in hand is confined to possession of a copy of the indictment (plus medical etc reports if any) He knows as little at the outset as do the jurors And even the assistance of an opening speech by counsel for the prosecution is properly as I think denied

In order to understand the inquisitorial or continental system it is necessary to go back a little in the sequence of proceedings You may remember that I described the preliminary stages of the French procedure with special reference to the point where police work gives way to judicial control I propose to go on from there in a brief description of the German system chosen because there are two excellent books in which it can be studied The first is a translation of

procedure shall take place If he does so decide or if he wishes to have the accused confined or if he wishes witnesses to be examined on oath he must hand over to an examining magistrate (*Untersuchungsrichter*) for a preliminary investigation to be conducted by him Thus it is not only that the accused is by now under judicial protection and secure from committal for trial except on a judicial warrant of prima facie sufficiency of evidence it is also true that what has been set on foot is not so much an inquiry Did A do X? which as we have seen is characteristic of our own procedure but rather a search for evidence which is uninhibited and unrestricted since impartial and is directed more to the question Who did X? You may remember that it was the narrowness of the scope of inquiry into the minimum of facts necessary to bring home guilty to Hanratty that was the main criticism of our procedure as disclosed in what was called the A6 murder This would have been just as true of Scotland or the USA as it was of England

The duty of the judge is to investigate both at preliminary inquiries and at public trials the facts relating to the trial and to take his part according to his findings in verdict and sentence The attorney attends to the interests of the accused from the earliest stages Since December 1964 his functions have been greatly enlarged especially in those early stages he ensures that the defendant is not deprived of any procedural opportunity [21] He will urge the reception of supplementary exonerating evidence and he will sum up the whole case as defending counsel here will do While the prosecutor the attorney and the accused himself may ask supplementary questions of the witnesses they do not

[1] Schmidt *Introduction to CCP* p 21

examine witnesses in any sense that we would understand That is done by the presiding judge He may it is true allow cross examination but only on joint motion of the parties which is never made Cross examination does not comport with the German system of criminal procedure The genuine cross examination as it is known in Anglo American procedure presupposes an antagonism of the parties In Germany as already mentioned[22] prosecutor and defendant (or his counsel) do *not* just oppose each other as parties they do not engage in battle before the court they do not introduce the evidence to the court they do not neces sarily even represent opposing interests The proceedings would indeed be unrecognisable to us In the Karlsruhe trial to which I referred the authoress came in during the early part of the proceedings and found the presiding judge in the course of his interrogation of the accused This involves the eliciting of any previous criminal record

This pattern of criminal trial is familiar with local variations over a great part of the civilised world It had its origins we are told in France and was a manifestation of the liberalising ideals of the French Revolution In the German states of the eighteenth century and in other European countries the system in operation was inquisitorial in a quite primitive sense since alleged crimes were investi gated in secret by the judge who thereafter proceeded also in secret to trial and sentence It may be true to say therefore that the eighteenth century reformers were tenta tively introducing some of the accusatorial features of the traditional English mode and this is undoubtedly true of the German reforms of 1964 which I have mentioned Here

[22] *Ibid* p 21

we may see perhaps another example of the conflict or competition between contrasting concepts in the reconciliation of which may lie the true goal of the law maker We know certainly of directions in which we might properly call for alterations in our own system but we would make a great mistake if that were to lead us into an uncritical acceptance of other people s

The Time Element

One glaring defect is seen in the continental systems delay Of France in 1960 it was said Hitherto a period of arrest awaiting trial for eighteen months or more would not have been unusual in the case of a serious crime The Code does make provision for release on bail but this is very rarely granted [23] This would be utterly unacceptable here In Scotland when the accused is in custody his trial must be completed unless the Crown can show that the delay was no fault of theirs within 110 days after that time he must be set at liberty and cannot be charged again In England it is thought that the delay may be even less And in Germany although *Untersuchungshaft* (preliminary detention) is only permitted on certain specified grounds yet all the preliminary stages are open to appeal by way of *Beschwerde* to a higher court Delays can be very bad indeed a case is quoted of a man who having spent four and a half years in prison awaiting trial was sentenced to ten years hard labour for murder [24] This sort of thing seems to be inherent in the ideology If you lay great emphasis on the meticulous preparation of the case to be presented you are demanding

[23] Anton *op cit* p 454
[24] *Faces of Justice* p 128

a time-consuming process and since the evidence at the trial may become perhaps less important than the evidence in the dossier[25] the dimming of the recollection of the witnesses by the passage of time may become the less objectionable Professor Anton faces the facts quite squarely

The French trial in open court is contrasted unfavourably with the more spectacular trial which is a feature of systems based on English law But the antithesis is false unless the preliminaries to the two types of trial are taken into account The immensely careful preliminary investigations of the *juge d instruction* makes it unlikely that persons who in France are sent for trial are guiltless While they are still in law presumed to be innocent a common sense appreciation of the situation suggests that they are in fact more likely than not to be guilty That in France acquittals do from time to time take place (remember the English average of 39 per cent) seems to be more a reflection of the French juryman s traditional generosity of sentiment and suspicion of authority than a reproach to the quality of the *juge d instruction*[26] This almost makes the trial itself into a public formal acknowledgment of the justice of a conclusion which has already been reached by a private administrative process While in such circumstances delay is of the less consequence yet I do not feel we are here in the realm of what is or ought to be acceptable to our own public opinion

The Judicial Office

The element which must always distinguish the accusatorial from the inquisitorial system is the standing of the judge in

[25] German C C P., § 253
[26] Anton *op cit* p 456

the respective jurisdictions I do not think it is possible for a judge if he take into his own hands the conduct of a criminal trial by which I mean the public ascertainment of facts by the questioning of witnesses to achieve that image of impartiality upon which our cultures insist In fact it is something much more than impartiality It is to the judge that the community looks for the protection of the prisoner who is just a member of the community from the arbitrary power of the state This is an ideal which in history has sometimes failed many years ago the judges sometimes ganged up with the state for the suppression of the individual Today I would say that what is more than ever required is an insistence by the community looked at as a front of individuals on the vigour and efficacy of their defenders the judges against the might of the state looked at as a bureacratic engine It is curious that although in Britain and the U S A this function is in the criminal field taken for granted yet in Britain at least in the field of civil rights the people s freedom is not as well supported On the other hand in continental countries the judges consist of a hierarchy of civil servants under the authority of a Minister of Justice enjoying no little respect yet having a public standing quite different from ours and therefore much less potent as controllers of official pretensions But in the civil world when the individual requires the protection of his rights against the administrative octopus he has powerful judicial allies in the *Conseil d Etat* and the *Verwaltungsgericht* in comparison with which an Ombudsman is a pale shadow So here are irreconcilable ideas Whatever may be the law of the thing in fact he who conducts the trial descends to the forum This our system does not tolerate

as a judicial function but insists that the Queen s judges watch over the conducting of the trial by the parties immediately concerned or their advocates and see to it that the Queen s subjects come by no injustice

SOMETHING TO THINK ABOUT

Nevertheless while we must decline to accept the continental judicial apparatus as a whole since it is not in accord with a philosophy which we value that is not to say that we have nothing to learn from it or to deny that there are features of it which could usefully and properly be adopted by us without changing our principles I am convinced of the rightness of a system of exclusive public prosecution it is already a feature of many accusatorial countries in fact it is the rule rather than the exception It might well be worth pursuing however the idea of joining with the prosecutor in suitable cases private persons seeking damages for loss arising out of the crime In no circumstances ought prosecu tions to be conducted by the police This is to confuse two totally separate functions with bad effects on both After the police have made up their minds that a charge should be brought against an accused they should be forbidden to question him unless they bring him before a magistrate There is no objection to the police or the prosecutor questioning an accused before a magistrate Refusals to answer should be noted in order that in due time the proper conclusion might be drawn from the refusal After the prosecutor has taken over the case he should be entitled to bring the accused before a magistrate for interrogation at any time The prosecutor or the defending counsel or the

accused or in an emergency the police ought to be empowered to bring any lawfully compellable witness before the magistrate for interrogation on oath All interrogations should take place in private but in the presence of the prosecutor the accused and his defending counsel The whole records of all interrogations ought to be made available to the accused as soon as they have been transcribed If it is proposed to call a witness who has not been formally interrogated a summary of his expected evidence should be supplied to the defence in good time At the trial the accused ought to be a compellable witness for the Crown The whole life history family circumstances and personal character of an accused (including his previous convictions) ought to be laid before the judge and jury before verdict subject to the judge explaining to the jury the limitations on their significance Verdicts by a majority (not necessarily a narrow majority) should be permitted

These are not intended as prolegomena to a code of criminal procedure Still less am I representing the opinions or impending proposals of the Scottish Law Commission It is just an indication of some of the lines along which the general public might be thinking For my own part I have no doubt that if any of the suggestions I make were to be adopted we could still substantiate the claim that in our British systems where the proper security needs of the community find themselves in conflict with the ideal of justice and humanity to an accused, the latter must prevail And I think the foreign gentleman in the railway carriage might begin to believe that we took crime seriously